IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

87-5323

DAVID JOSEPH STEFFEN,

Petitioner

-vs- NO._____

THE STATE OF OHIO,

Respondent

On Writ of Certiorari to

The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE IMPOSITION OF THE DEATH SENTENCE AFTER A JURY DEATH VERDICT WHERE THE JURY IS INSTRUCTED THAT THEIR "RECOMMENDATION" IS ONLY A RECOMMENDATION AND THAT ACTUAL SENTENCE SHALL BE IMPOSED BY THE TRIAL COURT AFTER "ADDITIONAL PROCEDURES" ARE CONDUCTED.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN CALDWELL V. MISSISSIPPI.

II.

WHETHER ONE MAY CONSTITUTIONALLY BE SENTENCED TO DEATH WHERE THE AGGRAVATING FACTORS WHICH ARE USED TO PROPEL HIM INTO THE ELECTRIC CHAIR MERELY REPEAT ELEMENTS OF THE CRIME OF AGGRAVATED MURDER.

THE COURT HAS GRANTED CERTIORARI TO REVIEW THIS ISSUE IN LOWENFIELD V. PHELPS.

III.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE AFFIRMANCE OF THE DEATH SENTENCE BY THE STATE SUPREME COURT WHICH, IN PERFORMING ITS STATUTORY DUTY TO INDEPENDENTLY WEIGH THE AGGRAVATING FACTORS AGAINST THE MITIGATING FACTORS AND TO DETERMINE (1) WHETHER AGGRAVATION OUTWEIGHS MITIGATION BEYOND A REASONABLE DOUBT; (2) WHETHER THE SENTENCE IS APPROPRIATE AND (3) WHETHER THE SENTENCE IS DISPROPORTIONATELY SEVERE, MISALLOCATES THE BURDEN AND DEGREE OF PROOF IN RULING THAT THE DEATH SENTENCE IS PROPER BECAUSE IT WAS NOT ESTABLISHED THAT MITIGATION OUTWEIGHS AGGRAVATION, IN VIOLATION OF THE STATE STATUTES PLACING THE BURDEN ON THE STATE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT AGGRAVATION OUTWEIGHS MITIGATION.

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WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE THE IMPOSITION OF THE DEATH SENTENCE AFTER THE SENTENCING JUDGE, IN WEIGHING AGGRAVATING FACTORS AGAINST MITIGATING FACTORS, REFUSES TO CONSIDER A STATUTORY MITIGATING FACTOR, AND WEIGHS NONSTATUTORY, UNCONSTITUTIONAL AND UNPROVEN AGGRAVATING FACTORS AGAINST SUBSTANTIAL MITIGATING FACTORS ESTABLISHED BY THE DEFENSE.

THIS ISSUE WAS LEFT OPEN FOR FUTURE CONSIDERATION BY THE COURT IN BARCLAY V. FLORIDA.

V.

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VI.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION

David Joseph Steffen, Petitioner herein, respectfully prays for an order granting a Writ of Certiorari to review the judgment of the Supreme Court of Ohio affirming his conviction and death sentence for aggravated murder, rape and aggravated burglary.

OPINIONS BELOW

The decision of the Supreme Court of Ohio affirming David Steffen's convictions and death sentence was rendered June 24, 1987, is reported at 31 Ohio St.3d 111, 509 NE2d 383, and is attached hereto as Appendix A. The decision of the Court of Appeals, which is unreported, was rendered December 11, 1985, and is attached hereto as Appendix B. The trial court's opinion justifying the death sentence appears as Appendix C. The opinions being voluminous, they are presented in a separately bound appendix.

JURISDICTION

This Petition is timely filed, within 60 days of the judgment below on June 24, 1987, and is founded upon 28 U.S.C. 1257(3), Petitioner asserting here, and in the courts below, violations of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions being voluminous, they are appended hereto as Appendix D.

STATEMENT OF FACTS

David Joseph Steffen, Petitioner herein, was convicted by a jury in the Court of Common Pleas of Hamilton County, Ohio, of aggravated murder, aggravated burglary, rape and of two specifications of aggravating circumstances to the aggravated murder conviction. He was sentenced to death, and maximum sentences on the rape and aggravated burglary convictions. His appeals to the Court of Appeals for the First Appellate District for Hamilton County was denied, as was his appeal to the Supreme Court of Ohio.

In August, 1982, David Steffen was employed by the Hy-Pro Chemical Co. as a door to door salesman of a cleaning product marketed by that company. David approached the residence at 7214 Parkdale, Cincinnati, Hamilton County, Ohio, at about 3:00 P.M. There he encountered a resident of that single family home, Karen Range, 19 years of age (R. 1240). She was in the front yard, and David began his sales talk. He cleaned up a rust spot; Miss Range permitted Petitioner to enter the house to demonstrate the cleaner on other surfaces (R. 1489; 1531). The cleaner worked on the carpet, and was tried on some other surfaces, including the fireplace, where it was compared to the Range's cleaner (R. 65).

After asking whether he could demonstrate the cleaner in the bathroom, Petitioner was led by Miss Range into the bathroom, where he applied some of the substance to the tile grout, but was unsuccessful in removing the stain. He put more cleaner on the spot, intending to let it soak in. When he rose,

Miss Range rose at the same time and Petitioner's arm or head inadvertantly brushed against Miss Range's breast; she began to scream, and Petitioner told her he was not going to hurt her, that the contact had been an accident (R. 1489). Miss Range, however, kept screaming, and Petitioner tried to gag her with the rag, to no avail; he then began hitting her in the face and head, knocking her to the floor; but Miss Range continued to scream. When an attempt to gag her again failed, Petitioner went to the kitchen, obtained a paring knife, and cut Miss Range on the neck and throat, inflicting fatal injuries (R. 1489; 1531). Miss Range died a very short time following the infliction of the wounds, which were deep and very severe (R. 1682); such wounds would cause, and did cause, death in one to two minutes (R. 1714).

David then decided to "rape" Miss Range but he could not get an erection, and the attempt was fruitless (R. 1523; 1531). He then fled the Range home, discarding his shirt and other items.

David, a short time later, telephoned Cincinnati Police and reported that he he had been robbed in the Valley Shopping Center, near the Range home (R. 1333). He had given the investigating officer sufficient personal information to aid in his later apprehension for the killing of Miss Range.

Miss Range's lifeless form was discovered by her mother, Mrs. Laurene Range, when Mrs. Range returned home from work. Police were called and responded shortly thereafter. They found Miss Range's body on the floor of the bathroom; her blouse and bra had been ripped, and her slacks and panties had been pulled down her legs. Semen was found in her vagina and on her panties. Fingerprints corresponding to David's were located in the bathroom (R. 1446). Police photographed the scene, and removed physical evidence from the scene, including a brochure for the Hy-Pro product David had been selling that day, which brochure was found in the Range bathroom.

The next day, Cincinnati Police officers went to Wright-Patterson Air Force Base in Dayton, Ohio, and visited the

residence of Paul Steffen, Petitioner's brother. David was there, and police interviewed him after advising him of his rights (R. 1481). The ostensible purpose for the interview was to obtain more information on the robbery reported by David the day before. Initially, David told the officers that he knew nothing about the killing, but that his twin brother did; later he told the officers that his twin brother had committed the killing, and finally, David admitted that he himself had committed the homicidal act (R. 1489). He later gave police a tape recorded statement which was played at his trial (R. 1531).

David was arrested, and was later indicted by the Grand Jury of Hamilton County, which charged him with aggravated murder with two felony specifications, and also with the rape and aggravated burglary on which those specifications were based. He was tried to a jury in the Court of Common Pleas, Judge Robert S. Kraft presiding.

During the trial, the evidence presented basically indicated the facts as stated herein.

Petitioner raised the defense of insanity, and considerable psychiatric testimony was adduced on both sides of that issue. David's involvement in the homicide was never disputed, but the rape and burglary charges were denied. The jury convicted Petitioner on all charges, and the case was continued for a penalty trial for determination of sentence.

At the penalty trial, the defense introduced a letter written to Karen Range's parents by Petitioner several weeks before the trial expressing remorse and sorrow for what had occurred. Several friends and relatives of Petitioner testified to his miserable childhood; that his stepfather had forced Petitioner to kneel on uncooked rice for hours at a time; had forced him to stay in a cold bathtub full of ice cubes; had tied Petitioner to a crib trussed up in an army bag; forced Petitioner to exercise and to run until he was exhausted; beat Petitioner with a belt and other weapons; forced Petitioner to remain indoors for one entire summer; that Petitioner was a disturbed child and was sent away from time to time, and that

he would be abused by his stepfather when he returned. Petitioner got along fine with and was very protective of, girls and women, and was involved in church and youth activities.

Evidence in the form of psychiatric reports indicated that among the cruel and unusual punishments inflicted upon young David by his stepfather was the bizarre punishment of having dill pickles inserted into his rectum to "cure" him of soiling his underwear when he had diarrhea. At the age of seven, he was sent to a religious school for intractible youngsters, where he had his hair pulled out by the roots as punishment. He was sent at age 11 to a State school, Hawthornden, where punishments included being tortured by electric cattle prods. On one occasion when he was being returned to Hawthornden by state police after having run away, young David mentioned the cattle prods, initiating an investigation which resulted in his being bound naked and subjected to more abuse with cattle prods (Report of Dr. Fisher, Doc. # 111, 112). Dr. Fisher concluded that David was the product of a very abusive, even sadistic childhood. "There are few if any positive memories which he reports. There is a great deal of savage and sadistic brutality." Id. Petitioner made an unsworn statement at his trial, again expressing remorse and regret for what had occurred.

The jury, evidently unmoved, recommended the death sentence, and the trial court sentenced Petitioner to death and filed the written opinion required by law shortly thereafter.

The Court of Appeals, in a 49-page decision, affirmed the convictions and death sentence, finding the death sentence appropriate and that the aggravating factors outweighed the mitigating factors. The Ohio Supreme Court also affirmed.

A motion for rehearing was filed, but arrived a day late at the office of the Ohio Supreme Court. A motion for leave to file the Motion for Rehearing Instanter and to deem the motion timely filed was filed in the Ohio Supreme Court, but that Court has not ruled thereon. Accordingly, to preserve his right

to file this Petition, Petitioner has withdrawn his motion for rehearing in the Ohio Supreme Court and has filed his Petition within the 60 days provided by Rule. A motion for stay of execution of the death sentence is presently pending in the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

DESPITE THE REMAND BY THIS COURT TO THE OHIO SUPREME COURT IN ROGERS V. OHIO, ___ U.S. ___, 106 S.Ct. 518, FOR RECONSIDERATION IN LIGHT OF CALDWELL V. MISSISSIPPI, THAT COURT CONTINUES TO AFFIRM DEATH SENTENCES WHERE JURIES HAVE RETURNED DEATH VERDICTS AFTER HAVING BEEN INSTRUCTED THAT THE JURY IS NOT ULTIMATELY RESPONSIBLE FOR IMPOSITION OF THE DEATH SENTENCE.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE IMPOSITION OF THE DEATH SENTENCE AFTER A JURY DEATH VERDICT WHERE THE JURY IS INSTRUCTED THAT THEIR "RECOMMENDATION" IS ONLY A RECOMMENDATION AND THAT ACTUAL SENTENCE SHALL BE IMPOSED BY THE TRIAL COURT AFTER "ADDITIONAL PROCEDURES" ARE CONDUCTED.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN CALDWELL V. MISSISSIPPI.

The trial court instructed the jury at the penalty trial that:

> You must understand, however, the jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the Court follows certain additional procedures required by the laws of this State.
>
> Therefore, even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant, David Joseph Steffen, will actually be sentenced to death or to life imprisonment.

(R. 3017; emphasis added).

Caldwell v. Mississippi (1985), 472 U.S. 320, 105 S.Ct. 2633, was decided by this Court when Petitioner's appeal was pending, and the Court of Appeals permitted Petitioner to add the issue, addressed the issue on the merits, and rejected it. The Supreme Court of Ohio also rejected the issue on the merits, 31 Ohio St.3d at 113-114, 509 NE2d at 387-388.

* * * * * * * * *

This Court, in Caldwell, concluded that "it is constitutionally impermissible to rest a death sentence on a determination mad. by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere," 472 U.S. 320, 105 S.Ct. 2633, 2639. This is so because a constitutional capital sentencing scheme relies upon the premise "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision," McGautha v. California (1971), 402 U.S. 183, 208, 91 S.Ct. 1454, 1467, thus fulfilling the Eighth Amendment requirement of "reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina (1976), 428 U.S. 280, 305; 96 S.Ct. 2978, 2991.

In a case where the instruction to the jury with respect to their lack of ultimate responsibility for the death sentence was less prejudicial than that given here, this Court vacated the death sentence and remanded the matter to the Ohio Supreme Court for reconsideration in light of Caldwell, State v. Rogers ___U.S.___, 106 S.Ct. 518. The Ohio Supreme Court nevertheless reaffirmed the death sentence, State v. Rogers (1986), 28 Ohio St.3d 427, 504 NE2d 52, based on its lengthy analysis of the issue in State v. Buell (1986), 22 Ohio St.3d 124, 489 NE2d 795.*

The Ohio Supreme Court has continued to flout this Court's ruling with respect to the Caldwell issue; see State v. Williams (1986), 23 Ohio St.3d 16, 490 NE2d 906, and, of course, the decision in this case.

There are two aspects to this issue as it is presented in this case which compel the conclusion that the Court should

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* The Ohio Supreme Court, on rehearing, reversed the Rogers decision on other grounds and ordered a new trial on August 12, 1987. ___Ohio St.3d ___, ___NE2d ____.

grant certiorari and reverse. First, the Ohio Supreme Court continues to affirm death sentences in violation of Caldwell, based upon an incorrect and unconstitutional interpretation of Caldwell and the Ohio statutes; second, the instruction given here is more prejudicial than that given in Rogers, and is an instruction which is regularly given in Hamilton County in capital cases. The affirmance below will encourage further constitutional violations of this sort unless the case is reversed and the precise instruction given here is prohibited.

A. The Rationale of the Ohio Supreme Court Justifying the Instruction at Issue, and the death sentence imposed pursuant thereto upon Petitioner is Based on an Incorrect and Unconstitutional Interpretation of Caldwell and of Ohio Law.

The Ohio Supreme Court has given three reasons for upholding the constitutionality of the instruction given here: (1) The Ohio situation is distinguishable from that present in Caldwell because in Mississippi the jury is the sentencing authority, and in Ohio the judge is the ultimate sentencer; (2) The instruction is a correct statement of Ohio law; and (3) The instruction as given does not refer to the appellate process, as did the prosecutor's argument in Caldwell. See State v. Buell, supra., 489 NE2d at 812, State v. Rogers, supra, 504 NE2d at 56. We shall now demonstrate the incorrectness of those conclusions, and the consequent unconstitutionality of the result in this case.

(1) Under the Ohio capital statutes a jury "recommendation" of life imprisonment is absolutely binding upon all trial and appellate courts, and consequently the jury is the ultimate sentencer where life is recommended.

The Ohio Revised Code provides that where the jury in a capital case returns a verdict at the penalty phase recommending life imprisonment with either 20 or 30 years to parole, "the court shall impose the sentence recommended by the jury upon the offender", R.C. 2929.03(D)(2). Thus, what Ohio has is not strictly judge-sentencing, as the Ohio Supreme Court concludes, but a limited override whereby the trial judge may override a jury recommendation of death, but is absolutely bound by a life recommendation. Intermediate appellate courts and the Ohio Supreme Court may also override a death

recommendation by the jury, or a death sentence imposed or affirmed by the lower courts, but may not impose death where the jury has recommended life, R.C. 2929.05.

(2) The instruction given in this case constitutes a misleading and incorrect statement of Ohio law.

As the jury recommendation of life is absolutely binding upon all courts, the instruction given here constitutes a misleading statement of Ohio law, referring as it does to "additional procedures". The jury is not told what those additional procedures are. The jury is free to infer from the instruction at issue here that there are yet other proceedings at which the accused has a chance to avoid the death sentence; additional procedures at which he can present additional evidence which may yet spare his life; additional procedures in the nature of post-conviction or appellate review of the recommendation before the trial court imposes sentence. The possibilities are almost endless.

The trial court's instruction that the court is required to follow certain additional procedures required by state law, weakens the jury's sense of responsibility for its decision. The jury is encouraged to preserve the options of the trial court and to "pass the buck" to one who would not only have the final decision, but who would have more information and evidence on which to base the ultimate decision.

The "additional procedures" element of the instruction aggravates the prejudice caused by the instruction that the jury does not have the final decision, as it makes it even more likely that the jury will recommend death, and that the jury will give unconstitutionally slight consideration to the mitigating factors presented by the evidence.

3. The instruction, referring to "additional procedures" without explaining those procedures, cannot be inferred to exclude reference to the appellate process.

As indicated, the absence of a definition of the "additional procedures" in the instruction here under attack would lead the jury to conclude that there are other procedures in a court of law which could spare the accused. Merely because

the instruction does not specifically refer to appellate review, as did the argument in Caldwell, one cannot rationally conclude, as did the Ohio Supreme Court, that the jury will not reasonably conclude that their decision will not be reviewed. The identity of the reviewing agency, trial court, appellate court, clemency board, etc. is not the prejudicial feature of the instruction; the prejudicial feature is the fact that there will be further judicial review of their death recommendation, with a corresponding attenuation of their awesome responsibility.

We are aware that Caldwell concerns itself with prosecutorial argument, not final instructions. But the constitutional result is the same. Such an argument and the instruction given here are both fundamental error. If anything, the fact that the forbidden instruction came from the trial court and not the prosecutor compounds the error. The jury was not advised that their "recommendation" would carry great weight; this the jury would naturally defer to the trial court, whom they would logically feel is more able and more entitled to make the ultimate sentencing decision; and consequently, the jury having been so instructed, there is a substantial risk that because the instructions misrepresented the effects of the sentence, the jury was induced to forego making their own determination as to whether death was the appropriate sentence, and consequently their recommendation and David Steffen's death sentence are unreliable, Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987).

In addition, the fact that the suggestion comes from the trial court as part of its instructions of law, which jurors are bound by their oaths to follow, renders the error here even more prejudicial than that in Caldwell, which was concerned merely with prosecutorial argument, which jurors are not bound to follow.

In light of the decision of this Court in Caldwell, it is apparent that such an instruction is prejudicial, constitutional error. The "uncorrected suggestion that the responsibility for any ultimate determination of death will

rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Id., 105 S.Ct. at 2642. The instruction conplained of here certainly is an uncorrected suggestion to the jury that the trial judge, not they, has the ultimate responsibility for determining sentence, and that consequently the instruction as given is error of the first magnitude. It cannot be said that this instruction had no effect upon the jury's decision for death, and hence the death sentence imposed herein is unconstitutionally unreliable.

II.

THIS COURT, IN LOWENFIELD V. PHELPS, HAS ACCEPTED FOR REVIEW THE ISSUE PRESENTED HERE, WHETHER THE SAME UNDERLYING FELONY CONSTITUTIONALLY MAY BE TWICE USED TO ELEVATE AN ORDINARY MURDER INTO A CAPITAL AGGRATED MURDER. IT IS APPROPRIATE AND IMPORTANT THAT THIS ISSUE BE RESOLVED ON THIS DIRECT APPEAL FROM THE SUPREME COURT OF A STATE IN WHICH THE VAST MAJORITY OF DEATH ROW INMATES ARE IN JEOPARDY OF THEIR LIVES BECAUSE OF THE UNCONSTITUTIONAL DOUBLE USE OF SUCH UNDERLYING FELONIES.

THE ISSUE

WHETHER ONE MAY CONSTITUTIONALLY BE SENTENCED TO DEATH WHERE THE AGGRAVATING FACTORS WHICH ARE USED TO PROPEL HIM INTO THE ELECTRIC CHAIR MERELY REPEAT ELEMENTS OF THE CRIME OF AGGRAVATED MURDER.

Petitioner first raised this issue in his motion to dismiss the capital specifications on the ground that the Ohio statutes were unconstitutional. He has raised it at every stage since, and all courts have ruled on the merits of the issue.

A. The multiple use of the same felony as an element of the offense and as an aggravating factor unconstitutionally fails to narrow the class of eligible offenders.

Here, Petitioner was convicted of "felony" murder. That is, the homicide of Karen Range was alleged to have been purposeful, making the offense, without more, murder. The homicide was elevated to aggravated murder because of the allegations that the murder occurred during the commission of

the offenses of rape and aggravated burglary. The allegations of those two felonies then were used additionally as specifications to further elevate the homicide offense from aggravated murder to capital aggravated murder. Both appellate courts rejected Petitioner's challenge to this practice,, merely citing prior decisions of the Ohio Supreme Court.

In Zant v. Stephens (1984), 462 U.S.862, 103 S.Ct. 2733 and Barclay v. Florida (1984), 463 U.S. 939, 103 S.Ct. 3418, this Court held that, in a constitutional capital scheme, the function of aggravating circumstances is to genuinely narrow the class of murderers to those deserving, or eligible for the death penalty. The Ohio statutory scheme, wherein the same felony is used to provide an essential element of aggravated murder and, additionally, the specification rendering the offender capitally-eligible, does not utilize the aggravating circumstance in a constitutional manner, as such use of the felony does not and cannot provide the specific and categorical narrowing of the class of capitally eligible offenders; if anything, it broadens the class of capitally eligible offenders, in direct violation of the Eighth Amendment.

Recently, the United States Court of Appeals for the Eighth Circuit has ruled precisely as we urge the Court to rule here: that "Aggravating circumstances, in order to comply with the Eighth Amendment, must 'genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' [Zant v. Stevens, supra, 103 S.Ct. at 2742-2743.] An aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant upon whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime. Aggravating circumstances serve to reduce the danger that the death penalty will be wantonly or arbitrarily imposed, . . ." Therefore, "an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing

function." and a death sentence resulting from a violation of this principle is unconstitutional and cannot stand, Collins v. Lockhart (8th Cir. 1985), 754 F.2d 258, cert. den. __US__, 106 S.Ct. 546 (1986). The Fifth Circuit has rejected the rule of Collins, creating a conflict between the circuits which this Court has evidently decided to resolve, Lowenfield v. Phelps, 817 F.2d 285, cert. gr. ___U.S.___, 107 S.Ct. 3227 (1987).

B. Multiple use of the same felony to both elevate the crime and then to further enhance the penalty to death unconstitutionally permits the imposition of death for felony murder cases upon less proof than in murder cases involving prior calculation and design, but no felony, and is consequently discriminatory and unconstitutional.

Under the capital provisions of the Revised Code, one can commit aggravated murder in either of two ways: (1) the purposeful killing of another with prior calculation and design, and (2) the purposeful killing of another during the commission, the attempt to commit, or the fleeing immediately after the commission of certain specified felonies. R.C. 2903.01. There is no heirarchy established, and both alternatives are considered equally culpable.

Satisfaction of the requirements under either alternative, however, will not render the offender eligible for the death penalty. In addition, one or more of several statutory aggravating factors must be present, and charged, before the offender is in jeopardy of his life. Among the statutory aggravating factors, however, is one providing that the commission of the aggravated murder during the commission, attempt, or flight after the commission of, the same felonies which made the offense aggravated murder in the first place under R.C. 2903.01 also constitutes an aggravating factor, R.C. 2929.04 (A)(7). The same factor is thus used twice, first to enhance murder to aggravated murder, and then to elevate the aggravated murder to capital aggravated murder. When it is considered that the offender is also separately charged with the underlying felony itself, it is evident that the felony is actually used three times in a capital felony murder situation, and the offender is punished three times for the same act.

Consequently, the Ohio statutes, in felony murder situations, permit the prosecution to obtain the death sentence upon less proof than required to obtain the death sentence in a case involving prior calculation and design plus the presence of a statutory aggravating factor.

The Courts of other states with similar statutes have forbidden such double use of the commission of a felony to elevate the murder to aggravated (or, first-degree) murder, and then to use the same factor to further elevate the offense to capital aggravated (or, first degree) murder. State v. Cherry (N.C. 1979), 257 S.E.2d 551; Provence v. State (Fla. 1976), 337 So.2d 783, cert.den. 431 U.S. 969 (1977); Colley v. State (Ala. 1979), 405 So.2d 374; People v. Harris, 679 P.2d 433 (Cal. 1984).

As this Court has granted certiorari in Lowenfield, and since most of Ohio's nearly 100 death row inmates are in jeopardy of their lives because of the unconstitutional practice condemned in Collins and approved in Lowenfield, the issue is certainly ripe for review in this case, and the Court should grant certiorari and reverse Petitioner's death sentence as having been unconstitutionally obtained.

III.

THE OHIO SUPREME COURT, IN ATTEMPTING TO PERFORM ITS STATUTORY DUTY TO INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING FACTORS, MISALLOCATED THE BURDEN OF PROOF AND MISAPPREHENDED THE DEGREE OF PROOF, RESULTING IN A DEATH SENTENCE WHICH IS NOT ONLY CONTRARY TO STATE LAW, BUT WHICH IS AN AFFRONT TO THE EIGHTH AND FOURTEENTH AMENDMENTS. REVIEW IS NECESSARY LEST THE OHIO SUPREME COURT, AND OTHER STATE SUPREME COURTS, UTILIZE THE DECISION BELOW AS AUTHORITY LEGITIMIZING THE DOCTRINE THAT AN ACCUSED MUST PROVE HE DESERVES TO LIVE IN ORDER TO AVOID THE ULTIMATE SANCTION OF DEATH.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE AFFIRMANCE OF THE DEATH SENTENCE BY THE STATE SUPREME COURT WHICH, IN PERFORMING ITS STATUTORY DUTY TO INDEPENDENTLY WEIGH THE AGGRAVATING FACTORS AGAINST THE MITIGATING FACTORS AND TO DETERMINE (1) WHETHER AGGRAVATION OUTWEIGHS MITIGATION BEYOND A REASONABLE DOUBT; (2) WHETHER THE SENTENCE IS APPROPRIATE AND (3) WHETHER THE SENTENCE IS DISPROPORTIONATELY SEVERE, MISALLOCATES THE BURDEN AND DEGREE OF PROOF IN RULING THAT THE DEATH SENTENCE IS PROPER BECAUSE IT WAS NOT ESTABLISHED THAT MITIGATION OUTWEIGHS AGGRAVATION, IN VIOLATION OF THE STATE STATUTES PLACING THE BURDEN ON THE STATE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT AGGRAVATION OUTWEIGHS MITIGATION.

A death sentence is impossible under Ohio's capital statutes unless the trial jury in the first instance is persuaded, beyond a reasonable doubt that the aggravating circumstances of which the offender was convicted outweigh the mitigating factors present in the case, R.C. 2929.03(D)(2).

On appeal, Ohio's appellate courts are required to independently weigh the aggravating factors against the mitigating factors as well. More specifically, Ohio law places upon the Ohio Supreme Court the duty to

> review and independently weigh all the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence imposed is excessive or disproportionate to the penalty imposed in similar cases. . . . The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

R.C. 2929.05.

In the decision below affirming appellant's death sentence, the Ohio Supreme Court repeatedly misallocated the burden and degree of proof in conducting its independent weighing of aggravation against mitigation:

> Our view of the totality of the evidence compels us to conclude that these combined factors, if in fact these factors are mitigating, are insufficient to outweigh the aggravating circumstances of rape and burglary.

> . . . The history, character and background of the offender have already been explored, supra., with no mitigating factors found sufficient to outweigh the aggravating circumstances. . . . .
>
> . . . While we are sympathetic towards appellant's obviously lamentable past, we must conclude that the mitigating factors are inadequate to outweigh the aggravating circumstances in this case.

31 Ohio St.3d at 128-129, 509 NE2d at 398-399 [Emphasis supplied].

The Ohio Supreme Court, in performing its statutorily mandated independent (hence de novo) review, has misapprehended and misapplied the burden and degree of proof, and consequently, its affirmance of Petitioner's death sentence is unconstitutionally unreliable.

Under state law, the state has the burden of establishing, beyond a reasonable doubt, that the aggravating factors of which the offender was convicted outweigh the mitigating factors. The appellate courts are required by statute to independently weigh the aggravation and mitigation, and are forbidden to affirm a death sentence unless convinced beyond a reasonable doubt that aggravation outweighs mitigation.

The decision below demonstrates that Petitioner was denied his right to that independent review. By upholding his death sentence because the mitigation does not outweigh aggravation, the Ohio Supreme Court has placed the burden upon the accused to establish that mitigation outweighs aggravation. That burden cannot constitutionally be placed upon the accused, particularly where the burden-shifting is done by appellate decree in violation of clearly stated statutory mandates to the contrary, Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975), Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965 (1985).

Where constitutional state capital punishment statutes are violated by the state in the imposition of the death penalty, the Eighth and Fourteenth Amendments are violated, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976).

And where a state confers an important right or interest upon one accused of crime, and against whom the state seeks to impose a deprivation of life or liberty, the due process clause

of the Fourteenth Amendment will afford to the accused the enforcement of those rights by the federal courts, Vitek v. Jones, 445 U.S. 480 (1980); Wolff v. McDonnell, 418 U.S. 539; Hicks v. Oklahoma, 447 U.S. 343 (1980), Evitts v. Lucey, 469 U.S. 387 (1985).

Petitioner has a substantial and legitimate expectation that he will be deprived of his life only in accordance with, and with the benefit of, the procedural rights conferred upon him by statute. Those statutory rights include an independent weighing by every appellate court, including the Ohio Supreme Court, of the aggravation and the mitigation present in the case. Not only did the Ohio Supreme Court here fail to accord to Petitioner his right to an independent review, the Ohio court twisted the procedural protections afforded petitioner and used them against him.

If aggravation and mitigation are in equipoise, under the statutes, Petitioner is entitled to live, R.C. 2929.03(D)(2). The Ohio Supreme Court has misallocated the burden of proof by thrice holding that, if mitigation does not outweigh aggravation, then the offender must die. Thus, where the mitigation and aggravation are in equipoise, that is, where it is precisely as certain as not that the offender deserves to live, under the application of the decision below the offender must be sentenced to death.

The Ohio Supreme Court thus misallocated the burden of proof at the penalty phase from the state to the defense. But the court below also altered the degree of proof. It has decreed that Petitioner must die unless mitigation outweighs aggravation. Since the statutes actually require death only where aggravation outweighs mitigation beyond a reasonable doubt, the requirement of death here, where mitigation does not outweigh aggravation, places the risk of nonpersuasion on the offender. Thus, if the aggravation and mitigation are in equipoise, by definition one cannot outweigh the other beyond a reasonable doubt, for neither outweighs the other at all. But under the decision below, the defendant will die even where the

state does not prove beyond a reasonable doubt that aggravation outweighs mitigation. This not only offends the Ohio capital statutes, it offends the Constitution, which requires that the state prove each fact or circumstance entitling it to a conviction, or to a certain sentence, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068.

Unless reviewed and reversed, the decision below will work considerable mischief in Ohio and other state courts, mischief of a most ominous sort. Where states seek to exterminate their undesirables, they must be held by the Constitution to the strict application of the procedural and substantive rights they extend to those whose very lives are sought to be held forfeit to the awesome power of the state. Here, the bald and blatant perversion and inversion of the fundamental precepts that the state has the burden to prove beyond a reasonable doubt that the offender must die, must not be permitted to stand any longer than is necessary for this Court to review and reverse the judgment of the Ohio Supreme Court.

IV.

THE COURT LEFT OPEN FOR FUTURE CONSIDERATION IN BARCLAY V. FLORIDA THE ISSUE OF THE CONSTITUTIONAL EFFECT OF THE USE OF NONSTATUTORY, UNCONSTITUTIONAL, UNPROVEN OR IMPROPER AGGRAVATING FACTORS WHERE THE STATE STATUTE REQUIRES THE SENTENCER TO WEIGH AGGRAVATING FACTORS AGAINST MITIGATING FACTORS, AND WHERE SUBSTANTIAL MITIGATION IS PRESENTED BY THE DEFENSE. THIS CASE PRESENTS THE OPPORTUNITY TO RESOLVE THE ISSUE.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE THE IMPOSITION OF THE DEATH SENTENCE AFTER THE SENTENCING JUDGE, IN WEIGHING AGGRAVATING FACTORS AGAINST MITIGATING FACTORS, REFUSES TO CONSIDER A STATUTORY MITIGATING FACTOR, AND WEIGHS NONSTATUTORY, UNCONSTITUTIONAL AND UNPROVEN AGGRAVATING FACTORS AGAINST SUBSTANTIAL MITIGATING FACTORS ESTABLISHED BY THE DEFENSE.

Ohio law requires that the sentence of death may be lawfully imposed only where the aggravating factors of which the accused was convicted outweigh, beyond a reasonable doubt, the mitigating factors offered by the evidence, R.C. 2929.03.

Consideration of nonstatutory aggravating factors will result in the reversal of the death sentence imposed in reliance thereon, State v. Johnson (1986), 24 Ohio St. 3d 87, 494 NE2d 1061, 2941.14(B). The trial court, and the appellate courts reviewing independently the aggravating factors and mitigating factors, must consider all mitigating factors which are present in the case, including, but not limited to, those specified in the statutes, R.C. 2929.04(B).

Here, Petitioner contends that the trial court, in imposing the death sentence, refused to consider the statutory mitigating circumstance of youth [R.C. 2929.04(B)(4]); Petitioner further contends that the trial court sentenced him to death in reliance upon the nonstatutory (in Ohio) aggravating factor of future dangerousness; and in further reliance upon the constitutionally abhorrent nonstatutory aggravating factor of the public demand for retribution.

1. Refusal to consider the youth of Petitioner.

The trial court, in its written opinion purporting to justify the death sentence visited upon Petitioner, after reciting the fact that Petitioner was 23 years old at the time of trial, stated: "There is absolutely no evidence to suggest that he was a youthful offender or that his age was a factor that should be taken into account in mitigation of the sentence of death. This factor was not present." Op. p. 11.

Since Ohio law prohibits execution of those under 18 when the offense was committed, "youth as a mitigating factor can apply only to offenders eighteen or older and naturally should weigh most heavily in favor of those offfenders closest to eighteen," Domozick, "Fact or Fiction: Mitigating the Death Penalty in Ohio," 32 Cleveland State Law review 263 (1983-84), at 279. And, the statute mandates consideration of youth as a mitigating factor.

But the trial court here, rather than considering Petitioner's youth, and weighing it against the aggravating factors, concluded that the factor was not present at all. And

the Ohio Supreme Court compounded the prejudice by also concluding that the court considered youth but found it to be nonmitigating, 31 Ohio St.3d at 117, 509 NE2d at 390. In its own weighing process, the Supreme Court stated that a sentencer, or reviewing court "may properly choose to assign absolutely no weight to this evidence if it considers it to be nonmitigating. . . . Evidence which is not mitigating is not entitled to any weight as a mitigating factor in determining whether such factors outweigh the aggravating circumstances." 31 Ohio St. at 129, 509 NE2d at 399.

The Ohio Supreme Court has misapprehended the reach of the capital statutes. Youth is mitigating and, if present, is required to be factored into the delicate weighing process that will determine whether the offender will live or die. The trial court concluded that the factor is not present. Perforce, this means that the factor was not even weighed, and taints the trial court's sentencing process with unreliability. The Ohio Supreme Court may not, by judicial fiat, declare that a statutory mitigating factor is not mitigating, as it has done here. The presence of the factor may not be such as to equal or overcome the weight of the aggravating factors, but Ohio law and the Constitution require that such factors at least be considered. That was not done here, and David Steffen is in jeopardy of his life as the result.

2. Consideration of Public Demand for Retribution.

In imposing the death sentence upon David Steffen, the trial court stated in open court:

> This is what the Legislature had in mind when it passed the new death penalty law. The Legislature was reacting to the demands of the public for retribution and this is an appropriate case to provide such retribution.

(R. 3050; Emphasis supplied).

The Supreme Court of Ohio sloughed off Petitioner's claim by stating that the trial court's comments were merely made in open court and were not repeated in the written sentencing opinion; the Supreme Court, citing the "presumption of correctness in the proceedings below," held that the brief

remark had no significance such as to taint the sentencing process. 31 Ohio St. 3d at 116, 509 NE2d at 389. Indeed.

No principle of criminal law is more basic to traditional notions of fairness and justice than that one may not be convicted, or sentenced, merely because the public demands it. To hold otherwise, as the courts below have done, is to subject citizens accused of crime to the rule of men and not of law.

It is to be noted that the Ohio Supreme Court did not rule the pandering to public demand as correct; it merely found that the sentencing process was not tainted. If an argument to convict because the public demands it is grossly prejudicial, and it is, then the actual reliance by a sentencing court on such demand in ordering the execution of a citizen is a grave affront to the due process clause and the Eighth Amendment.

3. Consideration of the Nonstatutory Aggravating Factor of Future Dangerousness.

The trial court also stated at the sentencing hearing in which David Steffen was condemned to suffer death:

> The defendant has been described as a human time bomb waiting to explode. He did just that in this case and the results were devastating. There is no evidence to suggest that the same type of delayed explosive reaction could not happen again unless action is now taken to permanently prevent it.

(R. 3049-3050; emphasis supplied).

The trial court thus relied, in part, upon future dangerousness as an aggravating factor which obviously was factored into the statutory weighing process. But future dangerousness is not a statutory aggravating factor in Ohio. David Steffen was not indicted for or convicted of a death specification that he would be a danger in the future unless executed. Only those capital specifications included in the indictment and proved beyond a reasonable doubt may be considered in the capital sentencing process, R.C. 2941.14(B). Consequently, it was error for the trial court to consider this factor in the sentencing process, State v. Johnson, supra.

The Ohio Supreme Court rejected David Steffen's attack on the use of future dangerousness in the same manner that it

rejected his contention that the trial court impermissibly considered and weighed public demand in arriving at the death sentence. The Court merely held that the future dangerousness factor was not mentioned in the written sentencing opinion, but ("only") in open court at sentencing. With respect to this factor, as in the public demand consideration, the Ohio Supreme Court seems to conclude that since the trial court did not include the spoken sentiment (to a packed courtroom) in his written opinion, he didn't mean it. But it is on the record as having been considered, and the consideration of this nonstatutory aggravating factor clearly was considered in the sentencing process, or else the trial court would not have referred to it.

4. The consideration of the aggravated burglary conviction.

David was, however, indicted for and convicted of aggravated burglary and a capital specification based thereon. He had relied in the Court of Appeals on a recent opinion of the Ohio Supreme Court in State v. Barksdale (1983), 2 Ohio St.3d 126, 443 NE2d 501, which held that where one enters premises with permission, the commission of a subsequent felony thereon does not make him a trespasser, and, as trespass is an essential element of aggravated burglary, the offender perforce cannot be convicted of burglary, although he is, of course, criminally liable for whatever felony he does commit on the premises.

The approach of all three courts below to this contention is interesting. The trial court merely ignored Barksdale, and instructed the jury, over objection, that appellant's status was converted from a business invitee to a trespasser when he commenced the homicidal assault. The Court of Appeals ignored this twisting of the law by the trial court, and instead conjured up from thin air a demand by Miss Range to David that he leave the premises. [One who remains on premises after a demand to leave is a trespasser under Ohio law, R.C. 2911.21(A)] That "fact" is nowhere substantiated in the record. The Court of Appeals rationale generated a dissent from Judge Black that nowhere in the record was there any evidence

whatever of a demand to leave.

The trial court having twisted the law, and the Court of Appeals having left the law alone but having conjured up a fact from nowhere to justify the aggravated burglary conviction and the capital specification based thereon, the Ohio Supreme Court borrowed from both approaches. It held that, once the assault commenced, a "powerful inference" arose from which appellant's privilege to remain was terminated and that he knew it. His conscious decision to remain thus satisfied the element of trespass and ostensibly legitimized the conviction of aggravated burglary and its corresponding capital specification. This, of course, legitimized the death sentence as well, under the Court's logic.

5. Contrary to the command of the Ohio capital statutes, the trial court considered the nature and circumstances of the offense as aggravating, rather than mitigating.

The Ohio capital statutes require that the nature and circumstances of the offense be considered for sentencing purposes only as mitigating, R.C. 2929.04(B). That statute provides that the trial court "shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense." The opinion of the trial court contains considerable references, in lurid detail, to the gruesome and horrid facts of the offense. A fair reading of the opinion can lead only to the conclusion that the trial court did indeed consider the nature and circumstances of the offense as aggravating, rather than as mitigating, as the statute requires. Of course, we agree with the Ohio Supreme Court that "the nature and circumstances of some offenses will be such that no mitigating feature can be extracted," 31 Ohio St.3d at 117, 509 NE2d at 390. But we emphaticaly disagree with the Court below that by dwelling upon the morbid facts the trial court was "merely justifying its conclusion that no mitigating factors can be gleaned from the nature and circumstances of htis particular offense." Id.

There having been established no fewer than five violations

of the trial court's obligation to consider only certain aggravating fractors, and to affirmatively consider youth as a mitigating factor, we next turn to the constitutional error in the imposition of the death sentence upon David Steffen which is implicit in these five violations of the statute.

* * * * * * * *

This Court, in Barclay v. Florida, supra., held that a death sentence may constitutionally be imposed, even where nonstatutory aggravating factors are considered, in situations where at least one statutory aggravating factor has been established, and where no mitigation is offered. The rationale is that when the one statutory factor is balanced against (no) mitigation, the aggravation will prevail, and consideration of the other, nonstatutory aggravating factors, is subject to state harmless error analysis.

But Barclay did not involve a situation such as is present here, where improper, nonstatutory aggravating factors are to be weighed against substantial mitigation offered by the defense. The Court in Barclay accepted the fact that the consideration of nonstatutory aggravating factors was error. The touchstone for determining whether the error is reversible is the presence or absence of mitigating circumstances. "As long as mitigating circumstances had been found, it was impossible to know whether the result of the statutorily-required weighing process would have been different in the absence of the impermissible nonstatutory aggravating factor," Id., Stevens, J., concurring, 103 S.Ct. at 3432, n12.

Thus, the error in considering for capital sentencing purposes nonstatutory aggravating factors, or the refusal or failure to consider statutory (or nonstatutory) mitigating factors, or the consideration of lack of mitigation as aggravation, etc., all of which occurred here, is constitutional error of immense proportions, resulting as it necessarily did in the infliction of the death sentence upon David Steffen in violation of the constitutional requirement that the death sentence be applied uniformly and consistently,

with consideration of certain standards to avoid the arbitrary and capricious infliction of the ultimate penalty.

The death sentence imposed upon David Steffen is consequently indelibly stained with the taint of unreliability, warranting review and reversal by this Court. And this is so not for the sole benefit of Petitioner here, but for all those similarly situated, who continue to be subjected to sentencing proceedings in which improper aggravating factors must be weighed by the sentencers against meaningful mitigation offered in their defense. As stated by Justice Stevens, in such cases, "it is impossible to know whether the result of the . . . weighing process would have been different in the absence of the impermissible nonstatutory aggravating factor." This question was left unanswered in Barclay.

It is reasonable to assume that, in most capital cases, the defense is able to muster and to present some mitigation of a nature sufficiently substantial as to warrant consideration and weighing against the aggravating factors established by the prosecution. Most of the cases in this Court, however, have dealt with situations where there was no little or no mitigation offered, e.g., Zant v. Stevens, supra., Barclay v. Florida, supra. Review of this case will provide the opportunity for this Court to instruct the state courts as to the precise use which may be made of such improper factors in death penalty schemes where narrowly circumscribed aggravating factors must be weighed against mitigating factors.

V.

THE EIGHTH AMENDMENT AND THE DUE PROCESS CLAUSE ARE VIOLATED BY THE REFUSAL OF A STATE SUPREME COURT TO CONSIDER FOR COMPARISON PURPOSES UNDER A STATUTORILY-MANDATED PROPORTIONALITY REVIEW OF CAPITAL CASES ONLY THOSE CASES IN WHICH THE DEATH SENTENCE IS IMPOSED. WHILE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED, STATES MUST BE INSTRUCTED AS TO THE REQUIREMENTS IMPOSED BY DUE PROCESS ON THOSE PROPORTIONALITY REVIEWS THEY HAVE CHOSEN TO AFFORD TO THEIR CITIZENS CONVICTED OF CAPITAL CRIMES.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE REFUSAL OF A STATE SUPREME COURT, IN CONDUCTING A STATUTORILY-REQUIRED PROPORTIONALITY REVIEW OF A DEATH SENTENCE, TO CONSIDER FOR COMPARISON ANY CASES OTHER THAN THOSE IN WHICH THE DEATH PENALTY WAS ACTUALLY IMPOSED AND AFFIRMED.

It is acknowledged that the Eighth Amendment does not require that a state afford proportionality review of death sentences by the state appellate courts, Pulley v. Harris, 465 37, 104 S.Ct. 871 (1984). But it should also be recognized that this Court has applauded the use of state proportionality review schemes as a method of avoiding arbitrary and capricious infliction of the death sentence, Zant v. Stephens, supra., n 19, citing Stephens v. State, 227 S.E.2d 261.

Ohio has chosen to require its appellate courts to conduct a proportionality review of death sentences, R.C. 2929.05. The due process clause requires that such proportionality review comport with the requirements of fundamental fairness in its application, Vitek v. Jones, supra., Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227 (1980).

To David Steffen's contention that the Court should consider for proportionality review all capital cases, not just those in which the death penalty was eventually imposed and affirmed, the Ohio Supreme Court held that "the proportionality review contemplated by R.C. 2929.05(A) should be limited to cases already decided by the reviewing court in which the death penalty has been imposed." 31 Ohio St.3d at 123, 509 NE2d at 395. The Court went on to deny David Steffen's proportionality challenge by citing two other cases in which the Ohio Supreme Court had affirmed rape-murder conviction and death sentences, and concluded that David's death sentence was neither disprtionately severe nor inappropriate.

The prejudicial incorrectness in the procedure enunciated below for future application of proportionality review in Ohio capital cases is not merely in the sterile comparison of this case with two others (both of which involved rape murders of young girls); it is not even in the refusal to compare mitigating factors in all cases involved in the "pool;" it lies

in the refusal of Ohio courts to consider cases where substantial reasons exist for the imposition of the death penalty, but where it is not imposed.

In other states where proportionality review is mandated by statute, the Supreme Courts consider for comparison purposes not only cases in which the death penalty is imposed, but also cases in which the ultimate sanction is not imposed; see, e.g., Stephens v. State, supra. (Georgia); State v. Rogers 341 S.E.2d 713 (N.C. 1986), in which the North Carolina Supreme Court considered a proportionality review pool containing twenty-three death sentences and seventy-six life sentences.

The best example of the shallowness and unconstitutionality of Ohio's proportionality review as outlined in this case is the recent case of one Donald Harvey, who was convicted (in the same Court of Common Pleas of Hamilton County, Ohio which convicted and condemned Petitioner) of 24 counts of aggravated murder and five lesser charges, and sentenced to three consecutive life terms and twenty one concurrent life terms as the result of a plea bargain in which the prosecution did not seek the death penalty. See Appendix E for copies of press reports. No citation is available, as Harvey pleaded guilty and was sentenced on the date this Petition was completed.

Donald Harvey, by his own admission (of some 54 aggravated, premeditated murders, according to his attorney), is probably the most homicidal, monstrous butcher of human beings in the history of Hamilton County and of the entire State of Ohio. Yet under the rule announced below by the Supreme Court of Ohio, no person condemned to death for even one slaying may use Harvey's sentence for comparison purposes.

We do not make light of the offense committed herein. It was a horrible act. But how can a system which strives for the equal application of justice under law constitutionally permit the imposition and affirmance of death sentences in cases, require proportionality review, and then fail to even consider cases such as Harvey's in deciding that it is fair to send David Steffen to his death, and equally fair to spare Harvey who has been convicted of killing twenty-three more persons,

and who was never in jeopardy of the death penalty during the legal proceedings against him?

There may even be valid reasons for such disparity in sentencing; we doubt it. But those condemned to death ought to be permitted to explore those reasons through a meaningful proportionality review and to make of Harvey's sentence what they can before an impartial reviewing court not hamstrung before consideration begins by the decision below which eliminates cases such as Harvey's from consideration.

VI.

THE COURT SHOULD REVIEW AND REVERSE A DEATH SENTENCE WHERE A STATE SUPREME COURT IMPROPERLY INVOKES THE HARMLESS ERROR RULE TO IGNORE A PREJUDICIAL VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT, WHICH VIOLATION IS INSTRUMENTAL IN SENDING THE ACCUSED TO HIS DEATH.

THE ISSUE

WHETHER A STATE MAY CONSTITUTIONALLY CONVICT AN ACCUSED OF AGGRAVATED MURDER AND SENTENCE HIM TO DEATH BY USE OF THE HARMLESS ERROR RULE TO IGNORE A VIOLATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS IN CONVICTING HIM OF THE UNDERLYING FELONY CHARGE AND ITS CORRESPONDING CAPITAL SPECIFICATION.

The confrontation clause of the Sixth Amendment secures to all persons accused of crime the right to confront and cross-examine the witnesses against them; the guarantee is effective against the states through the due process clause of the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065 (1965).

Here, David insisted that he did not rape Miss Range, but tried to have intercourse with her after the attack which took her life. David stated that he was unable to get an erection, and intercourse was not consummated. However, semen was found in her vagina, and in the crotch of her panties, which had been pulled down her legs. The identity of the depositor of the semen was a significant issue at trial. Miss Range's fiance, one Shrider, was tested by police, as were Petitioner and Miss Range, for comparison of blood and semen samples, etc. The testing could not exclude wither Petitioner or Shrider as the

depositor of the semen.

The significance of the identity of the depositor of the semen is clear; if David did not deposit the semen, then he did not rape Miss Range. If he did not rape Miss Range, then the capital specification associated with the rape charge would fall, and his death sentence would have to be reconsidered.

In this context, the error in the admission of Miss Range's mother's testimony that Karen had told her she was a virgin and would remain so until married, consitutes grossly prejudicial error. The Ohio Supreme Court rejected the state's contention that the hearsay statement was not error. And it concluded that

> Even clearly relevant evidence is inadmissible if its probative value is substantially outweighed by a danger of unfair prejudice. . . . The potential for prejudice in Karen's statement is considerable. We believe it should not have been admitted. However, we are compelled to conclude that this error was, in the final analysis, harmless. Even if this hearsay testimony were excluded from consideration, the overwhelming persuasiveness of the remaining evidence would still be undeniable. Appellant confessed to the murder and there was substantial physical evidence to support his conviction of rape beyond a reasonable doubt. Thus, the error was harmless.

31 Ohio St.3d at 120, 509 NE2d at 392.

In footnote 11, the Ohio Supreme Court sets forth the physical evidence it holds as sufficient to establish rape beyond a reasonable doubt. But that evidence ignores the fact that semen was found in the crotch of Miss Range's panties, which had been pulled down her legs. If, as the Ohio Supreme Court concluded, "the semen was probably deposited while the victim was prone without her ever again being ambulatory," Id., there would have been no semen in the crotch of her panties. Additionally, the coroner found no trauma to the vagina. None, not even microscopic. And he conceded that the perfect drop of blood on the mons veneris which presumably would have been smeared during intercourse, could have dripped onto Miss Range from the wall, from the knife, or from Petitioner's glasses. Finally, the lack of blood on Miss Range's exposed nether regions indicates that she was slain before, not after, she was partially disrobed.

The purpose of the foregoing paragraph is not to persuade

the Court of David's innocence of the rape charge. It is, rather, to indicate that there is also physical evidence which compels the conclusion opposite to that reached by the Ohio courts: that David was not the depositor of the semen.

In this context, then, the admission of the hearsay statement of Miss Range was not only not harmless error, it was constitutional error of the first magnitude, a violation of the confrontation clause of the Sixth Amendment which was used to propel David Steffen into the electric chair. The Court is urged to review this issue and to hold that, with the need for heightened reliability in capital cases, use of the harmless error rule to ignore constitutional errors which obviously had an effect upon the result will not be tolerated.

CONCLUSION

For the reasons stated, the Court is urged to grant this petition for a Writ of Certiorari, and to reverse the convictions and death sentence imposed by the Ohio Courts.

Respectfully submitted,

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EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

87-5323

October Term, 1987

DAVID JOSEPH STEFFEN,

Petitioner

-vs- NO._____

THE STATE OF OHIO,

Respondent

On Writ of Certiorari to

The Supreme Court of Ohio

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF OHIO

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APPENDIX A

when they can prove their claims. Whether their claims have merit has nothing to do with the forum or the time in which they must present them.

A plaintiff cannot prevail when limitations bar his claim, simply because the defendant finally acknowledges its merit. Cf. *Dent* v. *Van Winkle* (1987), 30 Ohio St. 3d 80, 30 OBR 228, 507 N.E. 2d 345, at paragraph two of the syllabus. A claimant cannot choose any forum when a valid contract restricts the parties to another forum, simply because the adverse party ultimately admits that the claim has merit. Cf. *Noernberg* v. *Brook Park* (1980), 63 Ohio St. 2d 26, 17 O.O. 3d 16, 406 N.E. 2d 1095, syllabus.

Nor does the board's voluntary compensation for some previous underpayments change the result here. Apparently the board perceived that the teachers' claims were statutory under R.C. 3317.14, rather than contractual, so they remained enforceable in court for six years after the underpayments. See R.C. 2305.07. Hence, it chose to pay the difference between the salary owed and the salary paid for the preceding six years. The board did not thereby lose its right to require the teachers to comply with the contractual grievance procedure for any remaining claims.

We should enforce the parties' valid contract which provides an exclusive method for resolving their disputes. Consequently, we should reverse the judgments below, and enter judgment for the defendant school board.

MOYER, C.J., and WRIGHT, J., concur in the foregoing dissenting opinion.

THE STATE OF OHIO, APPELLEE, *v.* STEFFEN, APPELLANT.

[Cite as State *v.* Steffen (1987), 31 Ohio St. 3d 111.]

Criminal law—Aggravated murder—Proportionality review restricted to those cases already decided by the reviewing court in which death penalty has been imposed—R.C. 2929.05(A)—Evidence in mitigation phase—Wide latitude given to defendant—R.C. 2929.04(B)(7)—Court not required to accept as "mitigating" everything offered by defendant.

O.Jur 3d Criminal Law §§ 1844, 1844.5

1. The proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed.

2. While R.C. 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude to introduce any evidence the defendant considers to be mitigating, this does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant and admitted. The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight.

(No. 86-193—Decided June 24, 1987.)

APPEAL from the Court of Appeals for Hamilton County.

On August 19, 1982, the lifeless body of nineteen-year-old Karen Range was discovered by her mother in the bathroom of their residence in Cincinnati, Ohio. Karen's throat had been repeatedly slashed, her face and head were severely bruised and battered, and her clothes ripped open to expose her breasts and pubic region. Quantities of semen were found both in and around the vagina. Three separate bloody shoeprints were present on Karen's chest, one of which had been applied with sufficient force to cause a bruise. The cause of death was later determined to be exsanguination, or bleeding to death, as a result of the severing of the major blood vessels in the neck. The record discloses the following account of the events leading up to this tragic conclusion.

On the afternoon of Karen's death, appellant, David J. Steffen, then twenty-two years of age, was working as a door-to-door salesman of a household cleaning product called Hy-Pro. He approached the suburban residence of Karen's parents, with whom Karen was then living. Karen was in the front yard. Appellant demonstrated the product to her on several spots on the front landing and on the doorbell. According to appellant's testimony, Karen then allowed him to enter the house. Appellant made further demonstrations of the product in the living room and then he and Karen proceeded to the bathroom. The events that transpired in that room were described by appellant in his confession as follows.

With Karen observing, appellant sprayed some Hy-Pro on the rear base of the toilet. As he and Karen both straightened up to a standing position, he brushed against Karen's breast. She began screaming. In an attempt to silence her, appellant stuffed his cleaning rag into her mouth and began hitting her repeatedly. Karen continued to scream. Appellant grabbed her, ripping her blouse off, and knocked her to the floor. He then got a paring knife from the kitchen and cut her throat three times. According to appellant's confession, he tried raping her, but could not achieve an erection. The record indicates that in rage and frustration, he stomped on her chest. Grabbing the Hy-Pro bottle, appellant ran out of the house. He discarded his bloody shirt by some bushes (it was never found) and concealed the Hy-Pro supplies (later recovered). Realizing that his employer would expect an explanation for his absence, appellant concocted a tale

about being robbed. He called the police with this story and made out a police report.

The next day, appellant was picked up for questioning by Cincinnati police regarding his robbery report and the murder. Appellant initially denied any involvement. He then asserted that he had been present during the murder, but that his adopted brother had been the actual perpetrator. Eventually, appellant confessed to police that he alone had killed Karen but denied the rape.

Appellant was subsequently indicted for aggravated murder in violation of R.C. 2903.01, with specifications that the offense was committed while appellant was committing or attempting to commit the offenses of aggravated burglary and rape. Appellant was also charged with rape in violation of R.C. 2907.02 and with aggravated burglary in violation of R.C. 2911.11. Appellant entered a plea of not guilty on all counts.

Trial commenced on April 25, 1983. The jury returned a verdict of guilty on all charges: aggravated murder, both aggravating circumstances, rape and aggravated burglary. The subsequent sentencing hearing resulted in a recommendation by the jury that appellant be sentenced to death, upon their determination that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The trial court, upon completing its own duty to weigh the mitigating factors against the aggravating circumstances, adopted the jury's recommendation and imposed a penalty of death. In addition, appellant received consecutive sentences of seven to twenty-five years for rape and seven to twenty-five years for aggravated burglary.

The court of appeals affirmed appellant's convictions and sentence in all respects.

The cause is now before this court upon an appeal as of right.

Arthur M. Ney, Jr., prosecuting attorney, *Leonard Kirschner, Claude N. Crowe, Steven M. Tolbert* and *William E. Breyer*, for appellee.

H. Fred Hoefle and *William Flax*, for appellant.

DOUGLAS, J. The instant appeal presents this court with numerous issues concerning the appellant's convictions and the penalty of death subsequently imposed. For the reasons discussed *infra*, we affirm the judgment of the court of appeals in all respects and uphold appellant's death sentence.

Appellant's first two propositions of law challenge the trial court's instruction to the jury that their recommendation of death would not be binding on the court, and that the final responsibility for the imposition of the death penalty rests with the court. Appellant cites *Caldwell* v. *Mississippi* (1985), 472 U.S. 320, for the proposition that such an instruction impermissibly reduces the jury's sense of responsibility and increases the likelihood of a recommendation of death. Appellant further submits that this error was compounded by the court's statement that "* * * [t]he

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final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the Court follows certain additional procedures required by the laws of this State."

A substantially similar instruction[1] was considered by this court in *State* v. *Buell* (1986), 22 Ohio St. 3d 124, 22 OBR 203, 489 N.E. 2d 795. There, we rejected an identical argument that such an instruction is unconstitutional under *Caldwell*. *Buell* at 142-144, 22 OBR at 219-220, 489 N.E. 2d at 811-813. See, also, *State* v. *Rogers* (1986), 28 Ohio St. 3d 427, 28 OBR 480, 504 N.E. 2d 52; *State* v. *Williams* (1986), 23 Ohio St. 3d 16, 21-22, 23 OBR 13, 18-19, 490 N.E. 2d 906, 912. We are not persuaded to alter that position by appellant's argument herein.

Appellant's third proposition of law argues that the use of the same felony twice, to elevate the offense to aggravated murder and again to elevate it to capital aggravated murder, fails to narrow the class of offenders eligible for the death penalty. This court has previously rejected this argument. *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 177-178, 15 OBR 311, 322-323, 473 N.E. 2d 264, 279-280; *Buell*, *supra*, at 141-142, 22 OBR at 218, 489 N.E. 2d at 810-811; *State* v. *Barnes* (1986), 25 Ohio St. 3d 203, 206-207, 25 OBR 266, 269, 495 N.E. 2d 922, 924-925. For the reasons set forth in those decisions, we adhere to that position today.

In his fourth, fifth, sixth and seventh propositions of law, appellant attacks the legal sufficiency of his conviction for aggravated burglary and of the aggravating circumstance based thereon. His threshold argument maintains that the trial court erred in instructing the jury that one who lawfully enters premises becomes a trespasser[2] subject to conviction for burglary by virtue of the commission of a felony on the premises. Citing this court's holding in *State* v. *Barksdale* (1983), 2 Ohio St. 3d 126, 2 OBR 675, 443 N.E. 2d 501, appellant argues that once the privilege to enter the premises is granted, as here,[3] that privilege is not vitiated by the subsequent commission of a felony thereon.

We cannot agree with this application of our holding in *Barksdale*, *supra*. There, the accused entered an automobile dealer's car lot, open to the public, and broke into a locked car. This court struck down the ac-

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[1] The instruction in *Buell* read as follows:

"A jury recommendation to the Court that the death penalty be imposed is just that. A recommendation. And it is not binding upon the Court. The final decision as to whether the defendant will be sentenced to death or to life imprisonment will be made by me, the Judge, after following the procedure and applying the criteria set forth in the statutes." *Id.* at 143, 22 OBR at 220, 489 N.E. 2d at 812.

[2] R.C. 2911.11, aggravated burglary, provides in pertinent part:

"(A) No person, by force, stealth, or deception, shall *trespass* in an occupied structure * * *." (Emphasis added.)

[3] Appellant, the only surviving witness to the encounter between himself and Karen Range, testified that Karen permitted him to enter her home.

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cused's subsequent conviction for breaking and entering on the basis that the state had failed to prove the essential element of trespass. In so holding, we reasoned that the automobile dealer's tacit invitation to the general public to enter the lot was a grant of privilege and that one who entered the lot with the purpose of committing a felony thereon did not relinquish that privilege and, therefore, no trespass had been demonstrated.

The instant case is readily distinguishable from *Barksdale*. First, a private home is involved herein while *Barksdale* involved a used car lot open to the general public. The interest of a private person in the inviolability of his home is materially greater than that of a business owner in his business premises, particularly where the business premises are open to the public. Moreover, a privilege once granted may be revoked. In the case *sub judice*, unlike in *Barksdale*, the felony committed, once on the premises, was one of violence, directed against a human being who had the ability and the authority to revoke the privilege of initial entry, if such privilege was in fact granted as appellant testified.[4] We note further that R.C. 2911.21(A), defining criminal trespass, provides that:

"No person, without privilege to do so, shall do any of the following:

"(1) Knowingly enter *or remain* on the land or premises of another * * *." (Emphasis added.)

Under the circumstances of this case, even assuming lawful initial entry, the jury was justified in inferring from the evidence that appellant's privilege to remain in Karen's parents' home terminated the moment he commenced his assault on her. Appellant does not deny striking Karen repeatedly before killing her. From that undisputed fact, a powerful inference arises that appellant was no longer privileged to remain in Karen's parents' home, and that he knew his privilege had been terminated. In our view, this inference is so strong that it excludes the possibility of drawing from the same facts any other reasonable inference supporting a theory of innocence. See *State* v. *Kulig* (1974), 37 Ohio St. 2d 157, 66 O.O. 2d 351, 309 N.E. 2d 897, syllabus. We find no error in the trial court's instruction to the jury, nor are we persuaded that the state failed to prove the essential element of trespass.

In his eighth proposition of law, appellant contends that the trial court erred in considering the nature and circumstances of the offense, the future dangerousness of the accused, and the public demand for retribution as aggravating factors in making its sentencing determination, while giving no consideration whatsoever to the mitigating factors of youth and cooperation with law enforcement authorities.[5] As to the trial court's pur-

[4] The car lot in *Barksdale* was closed at the time of the accused's entry thereon. Thus, it may safely be assumed that there was no one present to revoke the privilege of entry.

[5] R.C. 2929.04 provides in pertinent part:

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ported reliance on the factors of appellant's future dangerousness and the public's demand for retribution, the remarks to which appellant objects[6] appear only in the court's oral statement in open court before sentencing. No mention of such factors is made in the actual written opinion of the court. Viewing the record as a whole, and mindful of the presumption of correctness in the proceedings below, we do not consider these two brief remarks to carry such significance as to taint the entire process of sentence determination in this case. See *State* v. *Coombs* (1985), 18 Ohio St. 3d 123, 125, 18 OBR 153, 155, 480 N.E. 2d 414, 416-417.

Nor do we find error in the trial court's consideration of the nature and circumstances of the offense.[7] R.C. 2929.04(B) provides that the

"(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, * * * the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

[6] The relevant remarks by the trial court read as follows:

"* * * [Appellant's] battered childhood was terribly unfortunate but has not, from the overwhelming weight of the professional evidence, caused him to be psychotic. It has perhaps been responsible, to some degree, in causing him to be a person with superficial and shallow restraints. More significantly, it has developed a person with dangerous propensities likely to explode at any time. The * * * [appellant] has been described as a human time bomb waiting to explode. He did just that in this case and the results were devastating. There is no evidence to suggest that the same type of delayed explosive reaction could not occur again unless action is now taken to permanently prevent it.

"This is what the Legislature had in mind when it passed the new death penalty law. The Legislature was reacting to the demands of the public for retribution and this is an appropriate case to provide such retribution."

[7] The relevant text in the trial court's opinion reads:

"* * * The true circumstances of the offense can be gleaned from the testimony of the State's witnesses who described the scene, the victim's condition, the condition and location of her torn clothes and the presence of semen both in the victim's vagina and in her panties and the presence of spermatozoa. There is ample evidence to indicate the very sordid nature of the offense and its specific consequences.

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court, in determining whether death is an appropriate penalty, "*shall consider*, and weigh against the aggravating circumstances proved beyond a reasonable doubt, *the nature and circumstances of the offense* * * *." (Emphasis added.) Thus, the court is *required* to review this factor. However, appellant appears to contend that the trial court's remarks on this subject reveal that it viewed the nature and circumstances of the offense herein as aggravating rather than mitigating as required by R.C. 2929.04(B). We do not agree. The statute merely requires that the court consider this factor in determining the mitigating factors to be weighed against the proven aggravating circumstances. Obviously, the nature and circumstances of certain offenses will be such that no mitigating feature can be extracted. By its statement on the gruesome and vicious nature of the murder, the trial court herein was merely justifying its conclusion that no mitigating factors can be gleaned from the nature and circumstances of this particular offense. We find nothing improper in the court's remarks.

Nor did the trial court fail to consider the mitigating factors of appellant's youth and cooperation with law enforcement authorities. The court did in fact consider the youth of the offender, but found it to be nonmitigating.[8] As to appellant's cooperation with law enforcement authorities,[9] appellant offered almost no evidence on this factor,[10] and, in any event, appellant's cooperation was minimal at best. He attempted to cover up his involvement in the crime by concealing evidence and giving a false robbery report to police. While it is true that appellant eventually confessed to the murder, this came only after initially denying involvement when confronted and then concocting a story about an imaginary adopted brother who committed the murder while appellant was in the next room. Appellant has always denied the rape. We do not consider this history as depicting cooperation with law enforcement authorities.

"It should be noted, from the * * * [appellant's] appearance in the courtroom that he was physically over-developed. He had a massively well developed chest and upper arms. It is evident that he either exercised regularly or worked out on muscle developing equipment. He looked every bit the part of an extremely strong person even though he wore glasses, suggesting that he had very poor eyesight and spoke very softly. The last moments in the life of Karen Range, in that small bathroom, and in very close proximity to the * * * [appellant], it must logically be inferred were filled with horror and pain."

[8] The trial court's remarks regarding the youth of the offender read as follows:

"(4) 'The youth of the offender.' The Court finds that the defendant was born December 22, 1959, and at the time of this trial was twenty-three years of age. There is absolutely no evidence to suggest that he was a youthful offender or that his age was a factor that should be taken into account in mitigation of the sentence of death. This factor was not present."

[9] The factor of the offender's cooperation with law enforcement authorities is not among those specifically enumerated in R.C. 2929.04(B)(1) through (6), but it may arguably fall within the catchall provision of R.C. 2929.04(B)(7).

[10] The probation officer who prepared the presentence report agreed at trial, in response to questioning, that appellant's behavior during the interview was "cooperative."

By propositions of law nine, ten and eleven, appellant attacks the sufficiency of the evidence to support his conviction of rape and the corresponding specification. Our review of the record reveals that the evidence was such that the jury could reasonably find that the victim had been raped and that appellant was the perpetrator.[11] Whether a rape had been committed, and by whom, are questions for the jury. A reviewing court will not disturb a jury verdict where there is substantial evidence supporting a reasonable conclusion that all elements of the offense were proven beyond a reasonable doubt. *State* v. *Eley* (1978), 56 Ohio St. 2d 169, 10 O.O. 3d 340, 383 N.E. 2d 132, syllabus. Appellant's rape conviction and the corresponding specification must stand.

Appellant contends in his thirteenth proposition of law that the trial court erred in failing to state in a separate opinion its specific findings regarding mitigating and aggravating circumstances and why the latter outweighed the former, as required by R.C. 2929.03(F).[12] We have thoroughly examined the opinion of the trial court and we conclude that it reflects full compliance with the requirements of the statute. The opinion outlines the aggravating circumstances of which appellant was found guilty beyond a reasonable doubt and considers in detail each of the potential mitigating factors. In a lengthy analysis of the evidence offered in mitigation, the trial court repeatedly explained why this evidence was entitled to relatively little weight. In sum, the opinion reveals that the trial judge was fully cognizant of his duties under R.C. 2929.03(F) and complied with the statute diligently and completely. Appellant's argument is without merit.

The fourteenth proposition of law involves appellant's motion to the

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[11] Quantities of semen were found in the victim's vagina, around the pubic region and on her underwear. Tests conducted on the semen failed to exclude appellant as the depositor, and disclosed the presence of living sperm, indicating that the semen was recently deposited. Further evidence established that the semen was probably deposited while the victim was prone without her ever again being ambulatory. A bruise was observed on the inside of the victim's upper thigh, consistent with the use of force. The victim's shorts and panties had been ripped open to expose her pubic region, and her blouse was also torn, exposing her breasts. A perfectly formed, uncongealed drop of unsmeared blood was found on the victim's pubic region, indicating that had sexual intercourse occurred after the drop had fallen there, it would have been smeared, leading to an inference that intercourse had taken place before, and very recently before, the drop fell. At the time she was found, the victim's hair was still wet from a shower, again indicating that the semen had been very recently deposited, since the shower would have rinsed it away. All this evidence leads to a compelling conclusion that a rape had occurred and that appellant was the perpetrator.

[12] R.C. 2929.03(F) provides in pertinent part:

"The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. * * *"

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court of appeals, filed over two years after the trial court's entry of its judgment of convictions and sentence, requesting remand of the cause to the trial court for a ruling by that court on appellant's motion for a new trial. The trial court denied the new trial motion without prejudice to its eventual refiling. The court of appeals then denied the motion for remand on the basis that the grounds for retrial were insufficient. Appellant argues that the court of appeals erroneously considered the merits of the motion for a new trial, which motion was not before that court.

We note at the outset that appellant's notice of appeal to this court appeals only from the appellate court's judgment of December 11, 1985 affirming his conviction and sentence. Thus, the appellate court's ruling on the motion for remand is not properly before this court. In any event, we fail to see any prejudice resulting to appellant from the appellate court's denial of his motion to remand since the trial court had already denied the motion for new trial without prejudice.

Appellant's fifteenth proposition of law alleges prejudicial error in the admission of certain testimony by the victim's mother. The following exchange occurred during direct examination of Mrs. Range by the prosecutor:

"Q. Did you have occasion to discuss sexual matters with * * * [your daughter Karen]?

"A. Yes, we did.

"Q. What did she tell you?

"A. She said that she would remain a virgin until —

"MR. STUEVE: Objection to that, Your Honor. That's hearsay.

"THE COURT: Objection overruled. The answer may stand."

Appellant asserts that Karen's statement to her mother was inadmissible hearsay, subject to no exception, and its admission constituted prejudicial error. The state counters that the statement was hearsay, but admissible under the exception to the rule relating to statements of then existing physical condition. We cannot agree completely with either argument.

Karen's statement of her intent to remain a virgin is hearsay under Evid. R. 801(C).[13] It clearly qualifies as an out-of-court statement "offered in evidence to prove the truth of the matter asserted" within the meaning of the rule. The state does not dispute this. As hearsay, the statement is not admissible unless subject to a relevant exception. Evid. R. 802.

We do not agree with the state's contention that the statement falls within the exception embodied in Evid. R. 803(3)[14] for a then existing

[13] Evid. R. 801(C) provides:

"Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

[14] Evid. R. 803(3) provides in pertinent part:

"*Then existing mental, emotional or physical condition.* A statement of the declarant's

physical condition. In discussing this "physical condition" exception, the authorities repeatedly speak solely in terms of physical pain, symptoms or sensations. See, *e.g.*, 4 Weinstein & Berger, Weinstein's Evidence (1985) 803-103, Paragraph 803(3)[01]; 4 Louisell & Mueller, Federal Evidence (1980) 518, Section 440; 2 Gard, Jones on Evidence (6 Ed. 1972) 266, Section 10:6; 11 Moore's Federal Practice (2 Ed. 1985) VIII-83, Section 803(3)[5]. We believe that this exception was never intended to apply to a physical condition such as virginity.

An argument may be made that Karen's statement is admissible under the "then existing state of mind" exception in Evid. R. 803(3) in that the statement evinced Karen's intent to refrain from sexual intercourse until some point in time, unidentified, but with a strong implication that she would remain a virgin until her impending marriage. In that light, the statement apparently would have been offered to show that Karen would not have consented to intercourse with appellant. "It has long been settled that the state-of-mind exception may be used as the basis for introducing statements showing the forward-looking intent of the declarant for the purpose of proving that he thereafter acted in accordance with that intent." 4 Louisell & Mueller, Federal Evidence, *supra*, at 540, Section 442. However, this argument is unpersuasive. The relevance of Karen's statement to the issue of her non-consent is tenuous at best. Even clearly relevant evidence is inadmissible if its probative value is substantially outweighed by a danger of unfair prejudice. Evid. R. 403(A). The potential for prejudice in Karen's statement is considerable. We believe it should not have been admitted. However, we are compelled to conclude that this error was, in the final analysis, harmless. Even if this hearsay testimony were excluded from consideration, the overwhelming persuasiveness of the remaining evidence would still be undeniable. Appellant confessed to the murder and there was substantial physical evidence to support his conviction of rape beyond a reasonable doubt. Thus, the error was harmless. See Crim. R. 52(A); *Buell*, *supra*, at 135, 22 OBR at 212-213, 489 N.E. 2d at 805-806.

Appellant urges in his sixteenth proposition of law that the trial court erred in granting the state's motions to excuse six prospective jurors because of their objections to capital punishment where four of these six persons were not unequivocal in their opposition to the death penalty and where none of the six was asked whether he would follow the instructions of the court in spite of his personal beliefs. However, appellant misapprehends the standards applicable in this setting. This court has held that "[t]he proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of

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then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) * * *."

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his duties as a juror in accordance with his instructions and oath." *State* v. *Rogers* (1985), 17 Ohio St. 3d 174, 17 OBR 414, 478 N.E. 2d 984, paragraph three of the syllabus. An examination of the record reveals that each of the prospective jurors in question stated either that under no circumstances whatsoever could he join in a recommendation of death or that he believed his conscience or religious beliefs would prevent him from following the court's instructions in that regard. This court is satisfied that the trial court's orders excusing these jurors for cause are amply supported by the record in each instance.

By his seventeenth proposition of law, appellant contends that the trial court deprived him of due process and the effective assistance of his counsel by affording inadequate time to prepare for the penalty phase of the proceedings. The trial court granted the defense a three-day continuance. Appellant argues that this was inadequate time for preparation. We do not agree.

At the conclusion of the guilt phase on May 17, 1983, over seven months had elapsed since appellant was arraigned on the instant charges. During that time, appellant was provided a psychologist to assist him in his defense. At the trial, defense counsel developed an extensive review of appellant's troubled childhood, personal background and emotional make-up, both through appellant's own testimony and through a psychological expert. At least two psychiatric reports were made at the request of the defense. Friends and family of the appellant were interviewed, many of whom testified at trial. Given the fact that defense counsel, in the face of appellant's admission to the murder and the quantity of evidence against him, must have at least contemplated the possibility of a guilty verdict, this court is persuaded that counsel had sufficient time and opportunity to prepare adequately for the penalty phase of this proceeding.

Appellant's eighteenth proposition of law challenges the admission of a presentence report prepared by a probation officer, where the officer had advised appellant that any statements made to him by appellant would remain confidential. This argument is without merit. Appellant requested this report himself. Indeed, no such report may be made in capital cases except upon the request of the defendant. R.C. 2929.03(D)(1). R.C. 2929.03(D)(1) further provides that once a presentence report is made, copies "* * * *shall* be furnished to the court, *to the trial jury if the offender was tried by a jury,* to the prosecutor, and to the offender or his counsel" (emphasis added) for consideration in determining the appropriate sentence. As this court has noted previously, "* * * the defendant decides whether to expose himself to the risk of potentially incriminating presentence investigations, including mental examinations. * * * [T]he jury should be privy to all information relevant to its task of deciding whether a defendant should be sentenced to life in prison or whether it should recommend that defendant be put to death." *Buell, supra,* at 138, 22 OBR at 215, 489 N.E. 2d at 808.

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Appellant's reliance on *Estelle* v. *Smith* (1981), 451 U.S. 454, is misplaced. There, the defendant submitted to a court-ordered pretrial psychiatric examination to determine his competency to stand trial for a capital offense. Over defense objection, the psychiatrist was later permitted to testify during the penalty phase concerning this examination and his conclusions, even though the psychiatrist's name did not appear on the prosecution's witness list. The United States Supreme Court vacated the sentence of death, holding that the admission of this testimony violated the defendant's Fifth Amendment privilege against compelled self-incrimination, since defendant was not advised before the psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a capital sentencing proceeding. *Id.* at 461-469. In so holding, the court emphasized that the examination was conducted in a custodial setting, under the coercion of a court order, without notice to the defendant that the information extracted from him could later be used to secure the death penalty. *Id.* at 467. This scenario is readily distinguishable from the instant case. Here, the interview by the probation officer was instigated *at appellant's request*. Unlike in *Estelle*, appellant's counsel had every reason to know that the resulting presentence report would be revealed to the jury, since R.C. 2929.03(D)(1) so requires. The interview of appellant, and his responses to the probation officer, were free of any of the coercive aspects so central to the court's analysis in *Estelle*. This court is persuaded that the considerations which compelled the holding in *Estelle* are absent in this case.

Appellant's nineteenth and twentieth propositions of law contend that the death penalty in this case is disproportionately severe compared to penalties imposed in similar cases in the same county and that proportionality review must encompass not only cases where the death penalty was sought, but cases where it could have been, but was not. We reject both arguments.

R.C. 2929.05(A) provides, in pertinent part:

"* * * The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine * * * whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. * * * The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record * * * that the sentence of death is the appropriate sentence in the case."

This court has held that "R.C. 2929.05 requires the review of the pro-

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portionality of death sentences regardless of whether counsel has provided evidence of disproportionality." *Jenkins, supra*, at paragraph seven of the syllabus. We have also held that "[t]he proportionality review required of the court of appeals pursuant to R.C. 2929.05(A) need not include criminal cases outside its geographical jurisdiction." *Rogers, supra* (17 Ohio St. 3d 174), at paragraph nine of the syllabus.

Appellant urges that the court of appeals is required to consider not only cases where the death penalty was imposed, but cases where the death sentence could have been sought, but was not. This court has previously rejected this argument. "* * * R.C. 2929.05 does not require a comparison of sentences in non-capital murder cases for proportionality review, nor is a similar requirement imposed by the United States Constitution." *Jenkins, supra*, at 209, 15 OBR at 350, 473 N.E. 2d at 304.

We take this opportunity to clarify the procedures which must be followed by this court and the court of appeals in conducting the statutorily required proportionality review. The statute itself does not describe the scope of this review. Since proportionality review is not constitutionally mandated, *Pulley* v. *Harris* (1984), 465 U.S. 37, this court is relatively free, within the confines of the statute, to determine the pool of cases to be used for comparison. *Rogers, supra* (17 Ohio St. 3d 174), at 186, 17 OBR at 425, 478 N.E. 2d at 996.

The purpose of proportionality review is to determine whether the penalty of death is unacceptable in the case under review because it is disproportionate to the punishment imposed on others convicted of the same crime. *Pulley, supra*, at 43. For the following reasons, we are persuaded that the proportionality review contemplated by R.C. 2929.05(A) should be limited to cases already decided by the reviewing court in which the death penalty has been imposed.

Logic dictates that only those cases which result in a conviction have any use in proportionality review, since only then will a penalty result with which the death sentence under review may be compared. It is equally logical that only convictions of a capital crime are relevant for comparison purposes, since such cases are necessarily so qualitatively different from all others that comparison with non-capital offenses would be a profitless exercise. In fact, R.C. 2929.05(A), in requiring proportionality review, limits the scope of such review to "similar" cases. We are further persuaded that a court cannot make a meaningful proportionality review unless the pool of cases is restricted to those which the reviewing court has itself decided. Comparison with cases not passed upon by the reviewing court would be unrealistic since the reviewing court could not possess the requisite familiarity with the particular circumstances of such cases so essential to a determination of appropriateness. See *Rogers, supra* (17 Ohio St. 3d 174), at 186, 17 OBR at 425, 478 N.E. 2d at 996.

We hold, therefore, that the proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the

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reviewing court in which the death penalty has been imposed. Thus, a court of appeals need only compare the case before it with other cases actually passed on by that court to determine whether the death sentence is excessive or disproportionate. Similarly, proportionality review in this court will be limited to a review of cases we have already announced. No reviewing court need consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not.

Turning now to the instant case, we find that, compared with the death penalty cases decided by this court, the sentence herein is not excessive or disproportionate. The penalty of death has previously been imposed in cases involving rape-murder and the sentences have been upheld as appropriate. *Rogers, supra* (17 Ohio St. 3d 174); *State* v. *Maurer* (1984), 15 Ohio St. 3d 239, 15 OBR 379, 473 N.E. 2d 768. The death penalty was upheld in *State* v. *Williams* (1986), 23 Ohio St. 3d 16, 23 OBR 13, 490 N.E. 2d 906, where the victim was a seventy-six-year-old woman, beaten and shot to death in her home in the course of an aggravated robbery. These cases are similar to the instant cause in that each involved terrorizing and even torturing the victim by beatings and/or sexual assault before viciously murdering her. We find that the death penalty in the case *sub judice* is not inappropriate as either excessive or disproportionate given its appalling facts and its similarity to other cases resulting in a sentence of death.

In his twenty-first proposition of law, appellant argues that his right to equal protection was violated by virtue of the fact that the death penalty is almost uniformly imposed on those who kill whites while those who kill blacks are usually spared. The United States Supreme Court has rejected an identical argument in the recent case of *McCleskey* v. *Kemp* (1987), ___ U.S. ___, 55 U.S.L.W. 4537. In *McCleskey*, the defendant, a black, was convicted in Georgia of killing a white police officer and was sentenced to death. The defendant claimed that the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments. In support of this argument, defendant proffered a statistical study purportedly showing a disparity in the imposition of the death penalty, such that black defendants who kill white victims face a greater likelihood of receiving the death penalty, as compared to white killers of either black or white victims.

The court rejected defendant's argument, holding that mere statistics do not establish that the administration of capital punishment in Georgia violates equal protection. To sustain his claim, defendant must show that racial considerations affected the sentencing process *in his case*. *Id.* at ___, 55 U.S.L.W. at 4541. The court acknowledged that it has accepted statistics as proof of discriminatory purpose in other scenarios, such as employment and jury selection. However, the criminal law is fundamentally different. Discretion is essential to the functioning of the criminal justice system. Thus, exceptionally clear proof is required before an abuse

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of that discretion will be presumed. *Id.* at ____, 55 U.S.L.W. at 4542. Apparent discrepancies are inevitable in the criminal justice system. The Constitution is satisfied where sufficient safeguards exist to prevent arbitrary and capricious imposition of the death penalty.

Appellant herein has offered absolutely no evidence that improper racial considerations prompted the jury's recommendation of death in this case. Without any evidence that racial bias affected the sentencing process *in his case*, appellant's claim of violation of his right to equal protection must fail.

Appellant's twenty-second proposition of law contends that the trial court erred to his prejudice by instructing the jury in the penalty phase to disregard feelings of sympathy in their deliberations. This court has previously rejected this argument, and we adhere to that position today. *Jenkins, supra*, at paragraph three of the syllabus; *State* v. *Scott* (1986), 26 Ohio St. 3d 92, 108, 26 OBR 79, 93, 497 N.E. 2d 55, 68. Our conclusion that such an instruction does not constitute error is buttressed by the recent decision of the United States Supreme Court in *California* v. *Brown* (1987), 479 U.S. ____, 93 L. Ed. 2d 934. In *Brown*, the court upheld an instruction, given during the penalty phase of a capital trial, cautioning the jury to disregard " 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.' " *Id.* at ____, 93 L. Ed. 2d at 939. In so holding, the court rejected the contention that such an instruction impermissibly prevents the jury from giving due consideration to mitigating factors raised by the defendant. The court looked at the instruction as a whole, and determined that no reasonable juror would extract the word "sympathy" from the litany of factors and regard it as a license to ignore defendant's evidence in mitigation. Rather, a reasonable juror would interpret the term from its context as forbidding reliance on *mere* sympathy, i.e., extraneous emotional factors. *Id.* at ____, 93 L. Ed. 2d at 940-941. The instruction was not error.

Appellant's twenty-third proposition of law, comprising subparts (A) through (G), attacks from various angles the constitutionality of the statutory scheme for the imposition of the death penalty in Ohio. A review of appellant's argument reveals that all aspects thereof have previously been rejected by this court. The contentions that the statutory death penalty scheme serves no rational state interest, that it is impermissibly quasi-mandatory, that it impermissibly prevents juries from extending mercy, that it provides too little guidance to the sentencing authority, and that it fails to narrow the class of death-eligible offenders, were all rejected by this court in *Jenkins, supra*. The argument that the death penalty is inflicted disproportionately on those who kill whites as opposed to those who kill blacks has already been disposed of *supra*. Finally, the proposition that Crim. R. 11(C)(3) improperly encourages guilty pleas to avoid the death penalty in violation of *United States* v. *Jackson* (1968), 390 U.S.

570, has been rejected by this court in *Buell*, *supra*, at 138, 22 OPR at 215, 489 N.E. 2d at 808.

Our final task today is to undertake the independent weighing process required by R.C. 2929.05(A)[15] to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case.

The aggravating circumstances found to exist in this case consist of rape and aggravated burglary.

Appellant presented two witnesses[16] in the penalty phase of this proceeding as well as two psychiatric reports, a poem written by appellant and a letter also composed by him. Appellant addressed the jury in a very brief unsworn statement expressing his remorse.

The first defense witness was the probation officer who prepared the presentence report. He testified that his report had been hurriedly prepared in one day instead of the usual ten, that he did not know of the defense contention that appellant was mentally ill, and that appellant was cooperative in the interview. The second defense witness was appellant's sister. She testified about appellant's troubled childhood in which he suffered from excessive, often brutal discipline administered by his stepfather in whose eyes appellant could never do anything right. She further testified that appellant was sent away to a Catholic school for troubled children, that he became involved in a church youth group, that he had normal relationships with women, that he was very protective of her, that he wrote poetry, and that he is a "wonderful person." Many of these matters were treated in greater detail in the psychological reports submitted by Drs. Fisher and Schmidtgoessling.

Dr. Fisher's report describes appellant's background in some detail, including the sadistic discipline, appellant's frequent running away from whatever placement he was in, and his petty crimes as a child escalating into more serious offenses as he grew older. Dr. Fisher's conclusion, entitled "Factors in Mitigation of Punishment," is enlightening:

"As noted above, the history I have obtained certainly indicates an ex-

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[15] R.C. 2929.05(A) states in pertinent part:

"Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case * * *."

[16] Appellant attempted to introduce the testimony of a third witness, Claude Crowe, the assistant prosecuting attorney trying this case. The request for his testimony was later withdrawn.

tremely unfortunate, highly negative childhood. However it must be noted that other children from this same household were able to survive and become well-adjusted, stable adults. Mr. Steffen's brother, Paul, indicated to me over the telephone that it was his belief (and that of much of the rest of his family as well) that his brother David seemed to crave negative attention and to do everything within his power at all times to seek it. In any event, I believe that Mr. Steffen is free from any significant disease or defect of his mind. The personality structure which characterizes him is a maladaptive, self-defeating one, but does not, in my opinion, constitute mental illness as it is recognized either within the profession of psychology or by the law of this state. Furthermore, it is my opinion that at the time of the criminal acts of which he has been convicted, Mr. Steffen possessed the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. The screams which he reports having the effect of 'explosions' in his mind certainly panicked and provoked him. However, it is my opinion that this provocation was similar in magnitude and nature to that which he had experienced at other times in his life when he had been seen as acting impulsively and recklessly. The evidence does not suggest that a mental illness was precipitated at any of those times or in the current offense."

Dr. Schmidtgoessling's report also reviewed appellant's childhood and background. She concluded that "[h]is behavior at the time of the offense, specifically his loss of rational control, is typical of a personality disorder but is not the product of a mental disease or defect." She further stated that any "marked improvement in behavior is unlikely."

A letter written by appellant to his victim's parents was admitted into evidence. The letter expressed his regrets at having committed the offense and his sympathy for the grief that they had to bear as a consequence. However, Dr. Schmidtgoessling remarked in her report that appellant showed no remorse for his offense and no sympathy for his victim or her family.

R.C. 2929.04(B) provides that, in weighing the mitigating factors, the sentencing authority "shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

We find that, of the above-enumerated factors, numbers (1), (2), (3) and (6) do not exist under these facts. Number (4) is not compelling, as appellant was twenty-two years old at the time, substantially beyond the age of majority, and the evidence demonstrated that appellant was sufficiently mature to appreciate the consequences of his conduct.[17] As to factor number (5), appellant's past history of criminal convictions or delinquency adjudications cannot be characterized as insignificant. He had been convicted in 1977 of robbery and was sentenced to one to ten years' imprisonment. In 1979, he escaped from the reformatory and served one year in an Indiana State Prison. His juvenile offenses date back to 1972 and include arson, shoplifting, illegal entry, theft, burglary, larceny, escape, malicious trespass, carrying a concealed weapon and possession of marijuana. This statutory mitigating factor is entitled to little, if any, weight.

With regard to factor number (7), we have considered all the evidence of appellant's unfortunate childhood, his apparent lack of positive role models, and his attempts to straighten himself out through church youth group activities. Our view of the totality of the evidence compels us to conclude that these combined factors, if in fact these factors are mitigating,[18] are insufficient to outweigh the aggravating circumstances of rape and aggravated burglary.

Nor does our consideration of "the nature and circumstances of the offense, the history, character, and background of the offender" alter this conclusion. The nature and circumstances of this offense are so harrowing that no mitigating feature can possibly be imagined. The history, character and background of the offender have already been explored, *supra*, with no mitigating factors found sufficient to outweigh the aggravating circumstances. The mitigating factors are deemed insufficient on the basis that the evidence demonstrates that appellant's traumatic personal history did not substantially impair his capacity to appreciate the wrongfulness of his conduct or to control his actions. Dr. Fisher so concluded in his report. All four psychiatric experts who testified in the guilt

[17] In fact, Dr. Fisher's report characterized appellant as "very intelligent."

[18] Black's Law Dictionary (5 Ed. 1979) 903, defines "mitigating circumstances" as those which "do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability. * * *"

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phase of this proceeding agreed that appellant was not incapable of distinguishing right from wrong. Appellant's siblings were raised in the same abusive environment and yet were able to mature into well-adjusted, functioning adults. While we are sympathetic towards appellant's obviously lamentable past, we must conclude that the mitigating factors are inadequate to outweigh the aggravating circumstances in this case.

We would remark at this juncture that while R.C. 2929.04(B)(7) evinces the legislature's intent that a defendant in a capital case be given wide latitude to introduce any evidence the defendant considers to be mitigating, this does not mean that the court is necessarily required to accept as mitigating everything offered by the defendant and admitted. The fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight. For example, a defendant may introduce the testimony of his high school English teacher to the effect that defendant behaved well and was always prepared. However, the jury, or the court in its own independent weighing process, may properly choose to assign absolutely no weight to this evidence if it considers it to be non-mitigating. Only that evidence which lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty can truly be considered mitigating. Evidence which is not mitigating is not entitled to any weight as a mitigating factor in determining whether such factors outweigh the aggravating circumstances.

In conclusion, we uphold appellant's convictions and sentence of death. We are persuaded from the record that appellant was accorded a fair trial and a thorough, impartial review by the court of appeals. We are convinced that the death penalty is an appropriate sanction under these facts.

Accordingly, the judgment of the court of appeals is hereby affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, LOCHER, WRIGHT and H. BROWN, JJ., concur.

HOLMES, J., concurs in judgment only.

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APPENDIX B

~~APPENDIX C~~

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-830445 TRIAL NO. B-824004
Plaintiff-Appellee,	:	
vs.	:	DECISION.
DAVID JOSEPH STEFFEN,	:	
Defendant-Appellant.	:	

FILED
COURT OF APPEALS
DEC 11 1985
CLERK OF COURTS

Criminal Appeal from: Court of Common Pleas

Judgment Appealed from is: Affirmed

Independent Review: Aggravating Circumstances Outweigh Mitigating Factors

Appropriateness: Sentence of Death is Appropriate

Date of Judgment Entry on Appeal: December 11, 1985

Messrs. Arthur M. Ney, Jr., Leonard Kirschner, William E. Breyer, Claude N. Crowe and Steven M. Tolbert, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. H. Fred Hoefle, 1500 American Building, 30 East Central Parkway, Cincinnati, Ohio 45202, and Mr. William Flax, Mercantile Library Building, 414 Walnut Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

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PER CURIAM.

In this appeal from the appellant's death sentence, we have three tasks under R.C. 2929.05, as set forth in *State v. Rogers* (1985), 17 Ohio St. 3d 174, 175, 478 N.E.2d 984, 987-88. First, we must address the assignments of error presented by appellant, being twenty-eight in number. Second, we must independently determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case. Third, we must determine whether the sentence of death is appropriate, after considering whether it is excessive or disproportionate to the penalty imposed in similar cases. The Supreme Court must also address these same three issues.

We have studied the five death penalty cases officially reported by the Supreme Court at the time of our review: *State v. Martin* (1985), 19 Ohio St. 3d 122, ___ N.E.2d ___; *State v. Mapes* (1985), 19 Ohio St. 3d 108, ___ N.E.2d ___; *State v. Rogers, supra*; *State v. Maurer* (1984), 15 Ohio St. 3d 239, 473 N.E.2d 768, certiorari denied (1985), ___ U.S. ___, 105 S. Ct. 2714; and *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 473 N.E.2d 264, certiorari denied (1985), ___ U.S. ___, 105 S. Ct. 3514.

In Part II of this Decision, we find that the twenty-eight assignments of error are all without merit. We hold, in Part III, that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, and, in Part IV, that the death penalty is appropriate under the Ohio statutory framework.

I

In this section, we summarize the evidence, intending to present an overall understanding of the facts and circumstances surrounding the offense and the offender, as revealed by three thousand sixty-one pages of transcript and seventy-seven exhibits. More detailed consideration of various parts of the record will be found in other portions of this Decision.

At or soon after 3:30 p.m. on August 19, 1982, appellant, David Joseph Steffen, then age twenty-two, approached the residence where Karen Range, age nineteen, lived with her parents, at 7214 Parkdale in the residential suburb of Roselawn in Cincinnati. He was a door-to-door salesman of Hy-Pro, a general household cleaner, and had been dropped at the end of that street about 2:00 p.m. to demonstrate the cleaner and hopefully sell some. He was to be picked up an hour or so later at a designated location, but he never appeared there.

According to appellant's testimony, he found Karen in the yard and demonstrated the cleaner by removing spots of dirt from a concrete walk and from around the door bell. He was allowed inside the house to demonstrate Hy-Pro on the living room rug and the fireplace. The two then went to a small bathroom where he demonstrated how to clean the tile grouting in the shower and in an area on or near the backside of the toilet. What happened next is crucial.

The evidence is uncontroverted that Karen's body was later found on the floor of the bathroom, her throat slashed, her face

and head extensively beaten, her nose broken, her lips bruised, choke marks made on her throat (the choking was corroborated by other indicia in her eyes), and her clothes ripped off or torn away, exposing her breasts and pubic area. There were three footprints on her chest. She died of exsanguination (loss of blood) from four slashing wounds made to the right and front sides of her throat, severing four major blood vessels and the trachea. Death probably occurred within a minute of the infliction of the wounds. A bloody paring knife was on the floor nearby. Buttons and fasteners from her clothing were found in the washbasin and on the floor. Blood was splattered on the washbasin, the walls and Karen's body; it pooled on the floor. In or near the bathroom were a Hy-Pro pamphlet and the towel or rag and the toothbrush appellant had used to demonstrate the cleaner.

The autopsy disclosed, among other things, semen and spermatozoa inside Karen's vagina, on her pubic area and in the crotch of her underwear (which had been partially torn from her body), and a perfectly formed, unsmeared drop of blood on the mons veneris. Further, subdural and subarachnoid hemorrhages and extensive bruising of the face and head were sustained prior to death, suggesting a transient loss of consciousness.

Appellant's statement about what happened in the bathroom was that he lost his balance as he stood up from cleaning around the toilet, and his head accidently brushed Karen's breast. She began screaming, and he could not stop her. He tried to tell her that it was a mistake and put the cleaning rag in her mouth; he then

slapped her, hit her harder, tore her clothes and finally cut her throat. He stamped on her chest three times, because he was angry that her screaming caused him to kill her. While he admitted he killed her, he denied he raped her. (He said he thought of intercourse after she died but could not get an erection.)

Appellant left the house, threw away his bloody shirt (never found) and hid the demonstration bottles of Hy-Pro (later recovered). He called the Cincinnati Police from a public phone at 4:17 p.m. and reported he had been robbed of $50. After completing reports at a police station, he was taken back to his employer's temporary headquarters in a motel. He was fired because his employer caught him in a lie about the robbery. He was put on a bus and returned to his brother's house outside Dayton, where he had been staying at the time he was hired by Hy-Pro. He was picked up there the next evening for questioning about the murder, because a Cincinnati Police Officer recognized the connection between the murder and the alleged robbery. After an initial denial and then a strange story about the attack having been made by his adopted stepbrother (a complete falsehood), appellant confessed to the homicide but still denied the rape.

An indictment was issued charging appellant with the following offenses: First Count, aggravated murder of Karen Range, in violation of R.C. 2903.01, with two specifications under R.C. 2929.04(A)(7), first, while committing or attempting to commit aggravated rape, and second, while committing or attempting to commit aggravated burglary; Second Count, rape of Karen Range, in

violation of R.C. 2907.02; Third Count, aggravated burglary of the Range's "permanent habitation," in violation of R.C. 2911.11. On May 17, 1983, the jury found appellant guilty of all charges. The jury was then sequestered, and on May 20, 1983, after the sentencing hearing, the jury returned a recommendation that the death sentence be imposed on appellant. The trial court made its independent finding that by proof beyond a reasonable doubt the aggravating circumstances outweighed the mitigating factors and imposed the death penalty.

II

Many of appellant's twenty-eight assignments of error overlap. We will dispose of them in groups where this aids our exposition, not in the order found in appellant's brief but rather in a sequence we deem logical. The Appendix shows in which Subparts of this Part II, we discuss and dispose of each assignment of error.

We note that some of appellant's assignments present claims of error that were not brought to the attention of the trial court. They are deemed waived under *State v. Williams* (1977), 51 Ohio St. 2d 112, 364 N.E.2d 1364, *vacated on other grounds* (1978), 438 U.S. 911, 98 S. Ct. 3137, unless reviewable under the rule of plain error. Crim. R. 52(B). In assessing whether that rule applies, we follow *State v. Adams* (1980), 62 Ohio St. 2d 151, 404 N.E.2d 144, and *State v. Craft* (1977), 52 Ohio App. 2d 1, 367 N.E.2d 1221.

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II(A)

The ground underlying the first and ninth assignments of error has been plowed before. The ninth assignment of error presents the overall challenge to the constitutionality of the Ohio 1981 statutory framework for imposition of capital punishment. Appellant claims that seven different aspects of the capital punishment provisions (designated [A] through [G]) violate both federal and state guarantees of due process and equal protection and the right against cruel and unusual punishment. Three of the seven claimed aspects were not raised in the court below: aspect (B), the death penalty is inflicted disproportionately on those who kill whites as opposed to those who kill blacks; aspect (E), the statutes do not permit the jury to recommend mercy; and aspect (F), Crim. R. 11(C)(3) permits a court to dismiss an aggravating specification "in the interest of justice" upon reviewing a plea of guilty to aggravated murder, thus encouraging guilty pleas and allowing the death penalty to be imposed arbitrarily and capriciously. These claims were waived under *Williams, supra*, and none of them rise to the level of plain error. We discuss matters substantially identical to aspects (B) and (E) in Subparts II(I) and II(H), respectively, and we believe aspect (F) has been disposed of by *State v. Nabozny* (1978), 54 Ohio St. 2d 195, 375 N.E.2d 784, *vacated on other grounds* (1978), 439 U.S. 811, 99 S. Ct. 70.

The other four aspects of unconstitutionality have been held to be without merit by *Jenkins, Maurer* and *Rogers*. Aspect (A)

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asserts the death penalty is totally without penological justification, but this aspect was disposed of in *Martin*, *supra*, 19 Ohio St. 3d at 133, ___ N.E.2d at ___, *Maurer*, *supra*, 15 Ohio St. 3d at 241-42, 473 N.E.2d at 773-74, and *Jenkins*, *supra*, 15 Ohio St. 3d at 168, 473 N.E.2d at 272. Aspect (C) challenges the use of a felony (such as rape) to raise murder both to aggravated murder and to the death penalty, but this was disposed of in *Jenkins*, *supra*, 15 Ohio St. 3d at 177-78, 473 N.E.2d at 279-80. Aspect (D) argues that because the slightest outweighing of aggravating circumstances over mitigating factors invokes the death penalty, the statute is arbitrary and capricious; this claim was laid to rest in *Jenkins*, *supra*, 15 Ohio St. 3d at 171-72, 473 N.E.2d at 275-76. Furthermore, the Ohio statute requires that the standard to be used in the weighing process is proof beyond a reasonable doubt, a standard that goes far beyond "slightest." Aspect (G) asserts that the statutory scheme for sentencing provides insufficient guidelines to make the necessary decisions; this argument was handled in *Jenkins*, *supra*, 15 Ohio St. 3d at 172-73, 473 N.E.2d at 276, and *Rogers*, *supra*, 17 Ohio St. 3d at 176, 478 N.E.2d at 988.

The first assignment of error raises, in our opinion, a question of the general constitutionality of the Ohio framework (not a question of unconstitutionality as applied to this appellant, as he attempts to claim). It argues that the use of a felony other than homicide first to elevate murder to aggravated murder and then to impose the death penalty fails to narrow capital

cases appropriately and allows execution on less proof than premeditated (or "prior calculation and design") murder. These arguments are similar if not identical to those set forth in aspect (C) of the ninth assignment of error, and were disposed of in *Jenkins, supra*, 15 Ohio St. 3d at 177-78, 473 N.E.2d at 279-80.

In brief, the Ohio Supreme Court has held that Ohio's scheme for the imposition of the last full measure of retribution meets all the constitutional requirements, and the United States Supreme Court has not seen fit to accept an appeal. All Ohio courts are bound by these decisions. The first and ninth assignments of error are without merit.

II(B)

In the course of the voir dire examination, the trial court allowed the exclusion of six potential jurors because of their views on capital punishment. Appellant attacks the "death qualified" jury in two assignments of error. His twenty-third is phrased as a proposition of law, not as an assignment of error; it alleges that the systematic exclusion of persons opposed to the death penalty denied appellant his right to a fair and impartial trial. Construing this statement as the specification of an error by the trial court, we overrule it, because the law is abundantly clear that death qualifying a jury in the guilt phase of a bifurcated capital trial does not deny the defendant a trial by an impartial jury. *Jenkins, supra*, paragraph two of the syllabus; *Maurer, supra*, paragraph two of the syllabus; *Mapes, supra*, 19 Ohio St. 3d at 116-17, ___ N.E.2d at ___. It is not

onstitutionally necessary to have an exact cross-section of the efendant's "peers" in the jurisdiction. Those persons may be xcluded, under the latest pronouncement, whose views will pre- vent or substantially impair the performance of their duties as a juror in accordance with the court's instructions and the jury oath, without violating the constitutional guarantee of a fair and impartial jury. *Wainwright* v. *Witt* (1985), 105 S. Ct. 844, 855, 857, 858, 53 U.S.L.W. 4108, 4113, 4114.

In the twenty-fourth assignment of error, appellant contends that the elimination for cause of those prospective jurors who expressed some opposition to the death penalty violated both his constitutional rights and his statutory rights. We are not persuaded.

We perceive two tests. The first is set forth in *Witherspoon* v. *Illinois* (1968), 391 U.S. 510, 522 n.21, 88 S. Ct. 1770, 1777 n.21: jurors may be excluded for cause if they make it "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt" (emphasis in original). As is pointed out in *Jenkins*, *supra*, 15 Ohio St. 3d at 180, 473 N.E.2d at 281, this test is "reflected" in R.C. 2945.25(C), which states:

> A person called as a juror in a criminal case may be challenged for the following causes:

• • •

(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case.

The second test is the broader pronouncement found in *Wainwright v. Witt, supra,* 105 S. Ct. at 858, 53 U.S.L.W. at 4114, noted in the first paragraph of this Subpart; it allows the exclusion of persons whose views would (only) substantially impair the performance of their duties as jurors. It is not necessary that it be unmistakably clear that they would automatically vote against the death penalty.

We apply the first test to the instant record, because it is the more stringent constitutional test and it is incorporated in the Ohio statute. In each of the six instances, it was clear that the prospective juror would under no circumstances follow the court's instructions and give fair consideration to imposing the death penalty.

The examination of Stephanie Skurow (T.p. Vol. II, 383-91) made it sufficiently clear that there were no circumstances under which she would sign a verdict imposing the death penalty (T.p. Vol. II, 385), and she would not join the other jurors in such a verdict (T.p. Vol. II, 390).

Altie Allen (T.p. Vol. II, 429-32) stated at the outset that there were no circumstances under which she could join in a death verdict.

Dennis Anthony Sohmer (T.p. Vol. III, 509-13) would flatly

refuse to join in a death verdict, whatever the evidence and the law.

Eugene Lee Carlton (T.p. Vol. III, 530-38) would not join in a death verdict, despite some willingness to let others make that decision. We find that the court did not err, when at the end of a considerable exchange between this juror, counsel and the court, it concluded that Mr. Carlton's beliefs would prevent his joining in a guilty verdict under any circumstances.

William T. Pugh (T.p. Vol. III, 557-63) had a moral belief that clearly would prevent him under any set of circumstances from joining in a death penalty.

Pletis M. Auxier (T.p. Vol. IV, 764-69) was of the belief that the death penalty is not proper at any time (T.p. Vol. IV, 766) and would refuse to do her duty because she could not recommend a sentence of death (T.p. Vol. IV, 768-69).

In this as in any review of voir dire examinations, the trial judge who saw and heard these six persons is entitled to deference. *Wainwright v. Witt, supra*, 105 S. Ct. at 853, 53 U.S.L.W. at 4112. We find no error in the trial court's exclusion of these individuals from the jury.

Neither the twenty-third nor the twenty-fourth assignment of error has merit.

II(C)

Appellant contends that his conviction of aggravated burglary was erroneous, because the trial court incorrectly instructed the jury on one element of that offense (trespass) and

because the evidence was insufficient as a matter of law to prove the existence of that element. He raises various ramifications of these contentions in the second, eleventh, twelfth, seventeenth and eighteenth assignments of error. As will be revealed, hereafter, we disagree with the appellant's position that the jury instruction was incorrect and that the evidence was insufficient to prove a trespass. Consequently, we further disagree with the appellant's posture concerning the effect of these alleged errors on the sentences of death for aggravated murder and imprisonment for rape.

The jury instruction of which the appellant now complains is as follows:

> Now, in the third count of the indictment the defendant is charged with the crime of aggravated burglary. Before you can find the defendant guilty of this charge you must find beyond a reasonable doubt:
>
> (1) That on or about the 19th day of August 1982 and in Hamilton County, Ohio, the defendant by force, stealth or deception either unlawfully trespassed or once in remained in an occupied structure without authorization and that at the time the defendant had a purpose to commit rape.
>
> (2) That the structure he entered was the permanent or temporary habitation or residence of Karen Range.
>
> (3) That it was a structure in which at the time a person was present or likely to be present.
>
> Any entrance knowingly made in a residence of another or any remaining in is unlawful if it is unauthorized, without right or permission, or obtained by deception. Such entrance or remaining in would be known in the law as a trespass (emphasis added).

T.p. Vol. XV, 2721-22.

R.C. 2911.11 prescribes:

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present (emphasis added).

* * *

"Trespass" is defined in R.C. 2911.21 [Criminal Trespass] as follows:

(A) No person, without privilege to do so, shall do any of the following:

(1) Knowingly enter or remain on the land or premises of another (emphasis added);

* * *

Appellant cites *State v. Barksdale* (1983), 2 Ohio St. 3d 126, 443 N.E.2d 501, in support of his contention that he is not guilty of aggravated burglary because he did not trespass into the home of the deceased, for the reason that he was invited by his victim into the residence and his entry was therefore privileged. In *Barksdale, supra*, the Ohio Supreme Court held that an individual who is implicitly invited to come onto a business premises (such as a business invitee who enters a car lot to view the vehicles) does not become a "trespasser" under the

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breaking and entering statute (R.C. 2911.13) solely because he commits a felony while thereon. *Id.*, syllabus. The court resultantly upheld the reversal of the conviction, reasoning that the crime of breaking and entering requires a trespass and that no trespass was involved in the defendant's entry upon a used car lot, even though he entered with the intent to commit a theft. The court stated:

> The statute [breaking and entering] was not meant to function so as to enhance every criminal violation occurring on property not owned by the defendant. Such a construction does no more than trivialize the offense of breaking and entering, and cannot be embraced.

Id. at 129, 443 N.E.2d at 503.

In *State v. Lyons* (1985), 18 Ohio St. 3d 204, 480 N.E.2d 767, the Ohio Supreme Court distinguished *Barksdale* while affirming the trial court's verdict of breaking and entering. In *Lyons*, the defendant entered onto an honor system parking lot and attempted to break into an automobile parked thereon. In reaching its decision, the court noted that the defendant in *Lyons* was without privilege to enter upon the honor system lot, as such entry was conditional upon the proper payment of the required parking fee. *Id.* at 206, 480 N.E.2d at 769.

We are of the opinion that *Barksdale, supra*, is also distinguishable from the case *sub judice*, for several reasons. First, the instant premises was an occupied residence as opposed to the commercial car lot in *Barksdale*. Next, the crime *sub judice* is aggravated burglary, while *Barksdale* addressed only breaking and entering. Finally, no one was present in *Barksdale*

to revoke the consent, whereas in this case it is patent that the victim of the instant crime must have ordered the appellant to leave her home when his conduct first became suspect. We therefore conclude that the appellant remained in the victim's home and inflicted physical harm on her after his right to be there had been terminated.

In sum, we perceive *Barksdale* and *Lyons* to stand for the proposition that once there is a lawful entry on the premises of another, there must be an express revocation of the privilege of entry in order to convert the lawful entry into an unlawful trespass. Accordingly, we conclude that all the elements of aggravated burglary are supported by the record *sub judice*. We therefore overrule the appellant's second, eleventh, twelfth, seventeenth and eighteenth assignments of error.

II(D)

We find sufficient evidence of rape. Appellant denied the rape, but the trier of facts is not bound by either that denial or by the sequence of events recited by him. The physical evidence at the crime scene is amply sufficient for a reasonable mind to conclude beyond a reasonable doubt that appellant raped Karen before cutting her throat. The existence of semen inside her vagina and the presence of the undisturbed unsmeared drop of blood on her pubic area substantiate that sequence of events. A trier of fact could reasonably conclude from the evidence that the events occurred in the following sequence: some clothing was ripped, screaming started, Karen was beaten, she temporarily lost

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consciousness, she was raped, and her throat was cut, spattering blood over her body and the surrounding area.

Appellant contends that there is a reasonable doubt that he had intercourse with the victim. She was engaged to be married to James A. Shrider, and the blood tests used by the state could not exclude Shrider as the depositor of the semen in her vagina. The tests also could not exclude appellant, however. The tests were exclusionary only, and the results therefore were inconclusive. Furthermore, James Shrider testified that he had never had sexual intercourse with Karen at any time, and that he last saw her early in the evening before her murder when they made a short trip outside the residence. The condition and the positioning of the semen inside the vagina support the conclusion that it was deposited there at the time of the murder, not the night before.

We find no merit in the following assignments of error, for the reasons stated: the thirteenth, because the evidence was amply sufficient to support the rape conviction, *State v. Eley*, supra; the fourteenth, because the jury neither lost its way nor created a manifest miscarriage of justice, *State v. DeHass* (1967), 10 Ohio St. 2d 230, 227 N.E.2d 212, and *State v. Martin* (Feb. 9, 1983), Hamilton App. No. C-820238, unreported; the fifteenth, because the rape specification to the first count was amply supported by the evidence; and the sixteenth, because the prosecution was not required to establish beyond all doubt, but only beyond a reasonable doubt, that appellant raped the victim,

and the evidence including the scientific tests employed by the prosecution witnesses had sufficient reliability to underpin the death sentence.

II(E)

The tenth assignment asserts error in the trial court's failure to strike hearsay evidence. The issue arose while the prosecution was conducting direct examination of the victim's mother during the prosecution's case-in-chief, as follows (T.p. Vol. VI, 1247):

> Q. Did you have occasion to discuss sexual matters with her?
>
> A. Yes, we did.
>
> Q. What did she tell you?
>
> A. She said that she would remain a virgin until --
>
> MR. STUEVE: Objection to that, Your Honor. That's hearsay.
>
> THE COURT: Objection overruled. The answer may stand (emphasis added).

The prosecutor did not pursue this line of questioning, but rather turned to the events of August 19, 1982, the day of the murder.

The statement about Karen's intent was obviously hearsay. We perceive three purposes for introducing this statement, but none of them make the statement admissible. First, the statement could have been offered to prove Karen's attitude about premarital intercourse, but this is irrelevant to the issues at trial. What she may have thought about premarital intercourse at some indefinite time in the past does not reflect significantly

on the question of who deposited the semen in her vagina. Furthermore, the procedures of the "rape shield" statute, R.C. 2907.02(D) and (E) were not followed. Second, the statement could have been offered to prove that Karen was a virgin, but this is irrelevant to the issues at trial, and the "rape shield" procedures were not followed. Third, the statement could have been offered, as the prosecution argues it was, to establish that she did not have sexual intercourse with James Shrider prior to her murder. The prosecution suggests that the statement falls within the hearsay exception found in Evid. R. 803(3) which reads in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (3) *Then existing, mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will (emphasis added).

We do not believe that the quoted statement falls within that exception. The statement is simply not the type of statement that normally falls within the exception; that is, it was not offered to shed light on Karen's physical condition at the time the statement was made. 4 Louisell & Mueller, Federal Evidence (1980) 522, Section 440; McCormick, Evidence (2d Ed. Cleary Ed. 1972) 689, Section 291. Furthermore, it is not that type of declaration of intent to do a futu.e act that comes

within the exception. Statements about future intent have been allowed in other cases, if they were made under conditions of reasonable reliability (when the declarant had no motive to falsify his intentions) about a plan to do some act relevant to the issues in the case. They have been allowed as probative of the fact that the act under consideration was performed. *Mutual Life Ins. Co. v. Hillmon* (1892), 145 U.S. 285, 12 S. Ct. 909; 4 Louisell & Mueller, Federal Evidence (1980) 540, Section 442; McCormick, Evidence (2d Ed. Cleary Ed. 1972) 697, Section 295; 6 Wigmore, Evidence (Chadbourn Rev. 1976) 129, Section 1725. The typical situation involves an act relevant to the issues, a plan to do this act, and the person's declared intent to do it. In the instant case, the hearsay statement was to the effect that Karen had no intent to do an act (have sexual intercourse with James Shrider) and it was offered to prove she did not do it. It was offered to prove a negative. It is impermissible hearsay, not falling within the exception of Evid. R. 803(3).

It is, nevertheless, harmless beyond a reasonable doubt, under *State v. Bayless* (1976), 48 Ohio St. 2d 73, 357 N.E.2d 1035, vacated on other grounds (1978), 438 U.S. 911, 98 S. Ct. 3135, and *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S. Ct. 824, 828, as well as under Crim. R. 52(A). The "declaration" is incomplete in that we do not know precisely what event would terminate her virginity; in addition, we do not know when the statement was made or under what circumstances. Thus, its damaging effect was not major. Furthermore, the error is iso-

lated in this one moment in the trial; we find no other reference to the hearsay statement. Finally, James Shrider testified that he had never had sexual relations with Karen, and this surely is the most direct evidence relative to the factual question about the source of the semen found in the victim's body. We hold that the error had no perceptible impact on the appellant's conviction. We overrule the tenth assignment of error.

II(F)

In the eighth assignment of error, appellant argues that he was denied the effective assistance of counsel because the sentencing phase was held on the third day after the guilty verdicts were returned, giving his counsel too little time to prepare for the sentencing hearing. Trial counsel repeatedly objected to the shortness of time between the guilt phase and the sentencing phase, saying they never expected a guilty verdict and had not prepared for the sentencing phase. The excuse is without weight; counsel are traditionally required to anticipate all probable eventualities in trial practice.

The circumstances confronting the court at the conclusion of the guilt phase were that the jury and the five alternates were sequestered, twenty-two days had elapsed since the original court appearance of the jury and the alternates, the appellant had had seven and one-half months (from September 7, 1982 to April 25, 1983) to prepare, the defendant had been furnished with all the expert assistance he requested (except a polygraph test, to which he was not legally entitled), and both a presentence report and a

rental examination (requested by appellant) were ordered to be delivered to counsel on May 19, 1983. The defense had developed at the trial an extensive review of appellant's difficult childhood, personal history and emotional condition. Finally, defense counsel did not point to any evidence about mitigating factors that was unavailable because of insufficient time between the two phases of this trial.

We hold that the trial court did not abuse its discretionary control over trial proceedings. *State v. Sowders* (1983), 4 Ohio St. 3d 143, 447 N.E.2d 118; *State v. Bayless, supra*. The eighth assignment of error has no merit.

II(G)

The twenty-seventh assignment of error posits the argument that the trial court erred in denying appellant's motion to withhold the presentence report from the jury during the sentencing phase of the trial. He suggests only one prejudicial aspect of allowing the jury to see this report, and that is that the probation officer who prepared it mistakenly told Steffen that their conversation would be confidential. Patently that conversation could not be confidential, because R.C. 2929.03(D)(1) requires that copies shall be furnished to the court, the jury, the prosecutor and to the offender or his counsel, and that the court and the jury shall consider the reports in the sentencing phase. Steffen may not have known this, but his counsel did. Further, we are presented with no specific information revealed in that "confidential" conversation that was new and damaging to appel-

lant (the report recited appellant's long police record in detail, but that is not confidential), and our examination of the report discloses no information that was not before the court and jury either directly or by implication.

Appellant's current attempt to suggest he was not given *Miranda* warnings before the "confidential" conversation fails to impress us because the probation officer was never questioned on this point. Assuming *arguendo* that *Miranda* warnings are required under the circumstances, we cannot make the further assumption, on the record before us, that they were not given.

In any event, the defense requested that the presentence report be made, as it had the exclusive right to do under R.C. 2929.03(D)(1). No such report can be made unless the defendant requests it. One may presume that in making the request, defense counsel will advise the defendant of all pertinent aspects of the preparation and use of the report.

We note that appellant was successful in having removed from the report a statement by "the investigating officer" and in barring the prosecution from commenting on that statement in the jury's presence. This exclusion removed from the jury's consideration a potentially prejudicial opinion about appellant and the offense.

The twenty-seventh assignment of error is overruled.

II(H)

Nine of appellant's assignments of error raise questions about the sentencing phase, wherein the jury is instructed to

determine whether or not the aggravating circumstances the accused was found guilty of committing outweigh, beyond a reasonable doubt, the mitigating factors, and to make its recommendation as to whether the court should impose the death penalty, life imprisonment with parole eligibility after twenty full years, or life imprisonment with parole eligibility after thirty full years. R.C. 2929.03(D). If the recommendation is death, as in this case, the trial court must independently weigh the same circumstances and factors the jury considered before imposing sentence. R.C. 2929.03(D). The court must also state its reasons in a written opinion, as was done in this case. R.C. 2929.03(F).

These determinations do not end the process. All death sentences must be reviewed by both the court of appeals and the Supreme Court. R.C. 2929.05. In addition to reviewing the judgment and sentence as in other criminal cases, both reviewing courts must perform two tasks not required in other criminal cases: (1) they must independently weigh the aggravating circumstances the offender was found guilty of committing against the mitigating factors in the case; and (2) they must determine whether the sentence of death is "appropriate" (which means neither excessive nor disproportionate, as we read the statute).

The Supreme Court has twice held that a deviation from the statutory requirements in the trial court's weighing process does not require that the death sentence be set aside. In *Jenkins, supra*, 15 Ohio St. 3d at 194-200, 473 N.E.2d at 292-297, two of

the five aggravating circumstances should have been merged into the other three, but the failure to do so at the trial level was corrected on review by the Supreme Court. In *Maurer, supra*, 15 Ohio St. 3d at 246-47, 473 N.E.2d at 777-78, the trial court's written opinion was not made in compliance with R.C. 2929.03(F) because the reasons for the court's decision (that the aggravating circumstances exceeded the mitigating factors) were not articulated. Again, the Supreme Court held that the defendant was not prejudiced because it could correct any error. Neither Jenkins's nor Maurer's death penalty was set aside.

We will review each of the nine assignments of error attacking the sentencing phase and state our reasons why none of them present prejudicial error requiring the court to reverse or modify the judgment below. One of our reasons that applies to each of the nine is that the elaborate appellate procedures mandated by the statutory framework (and now in process of being accomplished in this case) will correct the errors, if any, at the trial level. See Part III, in which we carry out the weighing procedure, and Part IV, in which we determine the "appropriateness" of the death penalty in this case.

We understand the third assignment of error to assert that the trial court violated appellant's constitutional rights because in its written opinion, the court based its sentence of death on a nonstatutory aggravating factor, "the nature and circumstances of the offense." The assignment has no merit for two reasons: (1) the aggravating circumstances that weigh in favor

the death penalty are those the defendant was found guilty of committing, and we cannot conceive of any way in which the aggravating circumstances can be "weighed" without taking into consideration "the nature and circumstances of the offense" (in other words, the circumstances of the offense are a statutory consideration); and (2) as we read the trial court's opinion, (T.d. 144-10 *et seq.*), the trial court placed on the "weighing scale" as mitigating factors to be weighed <u>against</u> the death penalty both "the nature and circumstances of the offense" and "the history, character and background of the offender." (T.d. 144-12). In brief, we find that the trial court abided by the statutory framework and did not consider a nonstatutory factor in its careful, thorough and well-reasoned opinion.

In the fourth and fifth assignments of error, appellant argues his constitutional rights were violated by remarks made by the court on May 25, 1983, (T.p. Vol. XVI, 3046 *et seq.*) after it had separately weighed the aggravating circumstances and mitigating factors. (We note these remarks were not repeated in the court's written opinion (T.d. 144) and could therefore be deemed to have been later rejected by the court.) These remarks are found at T.p. XVI, 3049-50, the first paragraph being the subject of the fourth assignment of error, and the second the subject of the fifth assignment error:

> His battered childhood was terribly unfortunate but has not, from the overwhelming weight of the professional evidence, caused him to be psychotic. It has perhaps been responsible, to some degree, in causing him to be a person with superficial and

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shallow restraints. More significantly, it has developed a person with dangerous propensities likely to explode at any time. The defendant has been described as a human time bomb waiting to explode. He did just that in this case and the results were devastating. There is no evidence to suggest that the same type of delayed explosive reaction could not occur again unless action is now taken to permanently prevent it.

This is what the Legislature had in mind when it passed the new death penalty law. The Legislature was reacting to the demands of the public for retribution and this is an appropriate case to provide such retribution.

These remarks were made in open court and defense counsel did not object. The claims of error were waived, *Williams, supra*, unless these were plain error. We do not believe they were. The first paragaraph deals with "the history, character and background of the offender," R.C. 2929.04(B), and it is thus a statutory factor to be taken into consideration. This factor is supposed to weigh on the mitigating side, but it may contain nothing of a mitigating nature. We fail to perceive any plain error in the court's statement, assuming it had any effect at all on the court's ultimate judgment. All the court did was to review "the history, character and background of the offender."

The second paragraph quoted above does not rise to the level of plain error. In our view, the court simply remarked that the case fell within the statutory framework, which had been enacted by the legislature for purposes of retribution. Retribution is condoned by the United States Supreme Court as one of the purposes of the death penalty, the other being deterrence. *Gregg v. Georgia* (1976), 428 U.S. 153, 183-87, 96 S. Ct. 2909, 2929-31;

Hapes, supra, 19 Ohio St. 3d at 114, ___ N.E.2d at ___. In any event, we do not read the trial court's remarks as meaning that he intended to impose the death penalty on this defendant to satisfy public demand. The fourth and fifth assignments of error are without merit.

In the sixth assignment of error, appellant contends that his constitutional rights were violated because the trial court in its written opinion failed to give adequate consideration to the youth of the offender. The contention has no merit. The trial court did in fact consider appellant's age when it reviewed, seriatim, the seven mitigating factors listed in R.C. 2929.04(B). The court said:

> (4) "The youth of the offender." The Court finds that the defendant was born December 22, 1959, and at the time of this trial was twenty-two years of age. There is absolutely no evidence to suggest that he was a youthful offender or that his age was a factor that should be taken into account in mitigation of the sentence of death. This factor was not present.

(T.d. 144-11). The offender's age is an ultimate, determinative factor only when it is less than eighteen years, because in that event the death penalty may not under any circumstances be imposed. In the instant case, the trial judge gave adequate consideration to appellant's age. We may not agree with the court's unyielding, inflexible statement, but the effect of a relatively youthful age in an adult is a matter of opinion (and a reason for separate, independent weighing by the reviewing courts). The trial court gave appellant's "youth" its full attention.

In the seventh assignment of error, appellant asserts (in language sounding like a principle of law but interpreted by us to state a claim of error) that the trial court erred in failing to state the reasons why it concluded that the aggravating circumstances outweighed the mitigating factors. The assignment fails to be persuasive on two grounds: (1) we read the court's opinion as expressing extensively and at great length (for instance, by examination of each of the statutory factors) why the court considered the aggravating circumstances to outweigh the mitigating factors; and (2) the error, if any, is not prejudicial because as was specifically stated in *Maurer, supra*, 15 Ohio St. 3d at 246-47, 473 N.E.2d at 777-78, any failure to state "reasons why" will be corrected on review.

We understand the nineteenth assignment of error to claim that the evidence before the jury and the court during the sentencing phase (which included all the evidence from the guilt phase about aggravating circumstances, the offense and the offender) was legally insufficient to support the imposition of the death penalty. We understand the claim to be one of legal insufficiency, in violation of due process. We disagree. We find in the record sufficient evidence to convince reasonable minds beyond a reasonable doubt that the aggravating circumstances (those surrounding the rape) outweigh beyond a reasonable doubt the mitigating factors. We will not review all that evidence here, because we shall review it in Part III below, but we are certain that the quantum of evidence was sufficient and

that neither the jury nor the court erred.

The twenty-fifth assignment of error claims that the trial court erred because it failed to consider appellant's cooperation with the police as a mitigating factor. It has no merit because the alleged cooperation was not presented to the trial court as a mitigating factor, which would have been possible under the genera. catchall factor in R.C. 2929.04(B)(7) ("Any other factors that are relevant to the issue of whether the offender should be sentenced to death"). The claim of error is waived, *Williams, supra*, unless it is plain error. It is not plain error because we find no "cooperation." The appellant had to be run down in his lair and cornered there before he began to "cooperate." There was little or nothing of a mitigating nature in appellant's conduct towards law enforcement personnel.

The twenty-sixth assignment of error contends that the trial court erred when it instructed the jury not to "be influenced in your deliberations by any consideration of sympathy or prejudice." It has no merit, under the rule of *Jenkins, supra*, 15 Ohio St. 3d at 191-92, 473 N.E.2d at 290-91, and paragraph three of the syllabus.

We permitted the twenty-eighth assignment of error to be presented by a late, supplemental filing, out of our interest in fair review. In it appellant seeks to find error in the court's instructions to the jury during the sentencing phase that, even if the jury were to recommend death, the ultimate decision as to whether to order execution resided with the court (T.p. XVI,

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3017-18). The claim is that this trivialized the jury's recommendation about the death sentence. Appellant cites *Caldwell v. Mississippi* (1985), ___ U.S. ___, 105 S. Ct. 2633, which was handed down two years after the sentencing phase in the instant case. Because no objection was made to the court's instruction, appellant makes the alternative claim that the error was plain error or that defendant was deprived of the effective assistance of counsel due to counsel's failure to object.

We overrule this assignment. The trial court's instructions were an accurate statement of Ohio law, and an accurate statement of the jury's function is not an error under *Caldwell, supra*, ___ U.S. at ___, 105 S. Ct. at 2643. Additionally, the court told the jury that "the recommendation of sentence for the aggravated murder conviction is the sole responsibility of the jury" (T.p. XVI, 3020). The jury was not misled into believing that the responsibility for the death sentence rested elsewhere. We find no plain error and no failure of effective assistance of counsel.

II(I)

Appellant seeks to raise issues about the "proportionality" of the death penalty in this case, but we find no merit in the three assignments of error addressed to this matter.

Preliminarily we note three aspects of the "proportionality" issue: first, the issue is "appropriateness," because R.C. 2929.05 requires the appellate court to decide whether the death sentence in a case under review is "appropriate" and makes "excessiveness" and "proportionality" the prime considerations in

determining "appropriateness"; second, this issue is not presented to the trial court in a capital case, and it cannot therefore be the subject matter of an assignment of error by the trial court; third, it is not a constitutional requirement that this issue be addressed by the state courts, *Pulley v. Harris* (1984), ___ U.S. ___, 104 S. Ct. 871, but in Ohio, it is a statutory requirement, under R.C. 2929.05.

The twentieth assignment of error contends that the death penalty in the instant case violates the Eighth and Fourteenth Amendments to the United States Constitution (cruel and unusual punishment) because it is disproportionally severe. Appellant bases this contention not on the Ohio statutory requirement relating to appellate review of death sentences, but on the federal constitutional guarantee against cruel and unusual punishment. We find no merit in it for two reasons. First, the United States Supreme Court, as we read the decisions, has not laid down a rule of proportionality on the states separate and apart from the requirement that capital-sentencing procedures must focus the jury on objective considerations of the particularized circumstances of the offense and the offender *Jurek v. Texas* (1976), 428 U.S. 262, 273-74, 96 S. Ct. 2950, 2957. Second, what is required of the states is that all death sentences shall be individualized and particularized to the offense or offenses and the offender, under criteria sufficiently objective so that the sentence can be reviewed on a case by case basis. We believe the Ohio framework meets that requirement.

The twenty-first assignment of error asserts that appellant's death sentence violates equal protection guarantees because "in Hamilton County the death penalty is reserved, almost exclusively, for those who are convicted of the aggravated murder of white people" (emphasis added). We find no merit in this assignment of error for three reasons. First, the claim was waived because it was never presented to the trial court. *Williams, supra.* Second, the claim is not plain error because the trial court had no data of any nature before it to substantiate the claim. Third, this contention, if it has any merit, belongs in the appellate review of appropriateness and must be supported by references to those other cases that fall within the universe of cases we must consider in that review. Part IV, *infra.*

The twenty-second assignment of error states that appellant's death sentence is "disproportionally severe." We construe this statement to be directed to the appropriateness review mandated by R.C. 2929.05, which will be addressed in Part IV *infra.* Because the statements made in the twenty-second assignment of error do not set forth the assignment of an error made by the trial court, we overrule it.

III

Undertaking the task of independently reviewing and weighing the aggravating circumstances surrounding the rape and murder of Karen Range against the factors appellant has presented in mitigation, under R.C. 2929.05, we take into consideration the facts about the aggravating circumstances brought out during the guilt

phase of the trial. These were reviewed in Parts I and II and will not be repeated here.

To be weighed against them are whatever mitigating factors are revealed by the entire record of both phases of the trial. To structure our analysis, we follow the provisions about mitigating factors found in R.C. 2929.04(B).

We can discern nothing of a mitigating nature in "the nature and circumstances of the offense." It was a brutal, savage, senseless attack, which appellant's own counsel called a "wanton and insane slaughter" (T.p. Vol. VI, 1174).

Turning to appellant's "history, character and background," the record discloses that this man, twenty-two years old at the time of the offense, was "the product of a very abusive--even sadistic--childhood" aggravated by years of institutionalization and incarceration. (T.d. 111, Court Exhibit 2, page 9). The third of five children whose parents were divorced when appellant was three years old, he became the butt of the stepfather's punitive methods after his mother remarried when appellant was seven. All the children were punished for childhood transgressions, but the suggestion is that appellant was treated more severely than the others. Punishments were to kneel on uncooked rice or salt, to be placed in a tub of ice and cold water, to be forced to do push-ups and to run around the block until exhausted, to be beaten, whipped and kicked. On one occasion, appellant was locked inside a duffle bag with only his head sticking out for a night. Appellant ran away periodically; he wet his bed until

about age 11. When the stepfather declared he would leave if appellant were not sent away, appellant was sent to Parmadale Children's Village (Ohio) where he remained for over four years; his resistance to the program there led to his being sent to Hawthorne State Hospital for psychiatric evaluation and treatment (behavioral adjustment). Appellant asserts he was mistreated at both institutions, being shocked with an electric cattle prod at Hawthorne. After a release and second commitment to Hawthorne, he was placed in a series of foster homes without successful adjustment, and eventually broke away to drift about on his own.

His police record dates back to 1972, when at age 12, he was placed in juvenile detention for shoplifting, and continued through a series of thefts, burglaries, trespasses, possession of marijuana, escapes, and robberies. He served a four-year term for bank robbery, but gained his GED and was enrolled in college for a time, until he was caught forging a check. At the time of the instant offense, he had been incarcerated in Indiana for a robbery, he had later escaped, he had been paroled, and he had violated his parole by moving to Ohio without permission.

The overwhelming evidence is that appellant has no mental disease or defect, that he can and could distinguish right from wrong and that while the offenses of rape and murder were apparently committed in a rage, whatever inability he had to control his rage was not due to a mental disease or defect. He is described as "a borderline personality with antisocial features," showing "a lifelong pattern of social incompetence, inappropriate

aggression, and illegal activities" (T.d. 112, Court Exhibit 3, page 4). The principal emotion of a borderline personality is anger, producing periods of rage with little provocation (T.p. Vol. XIV, 2434).

The foregoing offers an explanation of appellant's character and psychological condition, but no excuse. We do not find in that explanation any material weighty enough to mitigate (lessen, moderate, counter) either his culpability or the sentence for rape-murder. His personal history has significantly tragic features, but in American jurisprudence, these do not in themselves excuse outrageous criminal conduct.

Appellant wrote a letter to Karen's parents (Court Exhibit 6-C) in which he expressed his regret for what he did and his prayer that they be spared the grief that they must bear. We have given this expression our attention, but we do not think it is determinatively mitigating.

Turning to the other mitigating factors listed by number in R.C. 2929.04(B), we conclude:

(1) There is no evidence that the victim of the offense deliberately induced or facilitated the attack;

(2) There is absolutely no evidence that the defendant was under any duress, coercion or strong provocation, making it impossible to conclude that he would not have raped and murdered but for such duress, coercion or strong provocation;

(3) Defendant did not have a mental disease or defect (appellant's psychological condition not being so categorized under

:hio law), and therefore, any inability to conform his conduct to ;aw was not due to mental disease;

(4) Appellant was an adult at the time of the offense, and while his age of 22 years would categorize him as a young adult, his age (youth) carries no weight in alleviating the horror of the rape-murder or ameliorating the death penalty;

(5) Appellant's significant history of prior criminal conviction and delinquency adjudication does not weigh in his favor;

(6) Appellant was, by his own admission, the only participant in the murder;

(7) There are no factors other than those recited above that are relevant to the issue of appellant's sentence of death.

In brief, we agree with the careful, thorough opinion prepared and filed by the trial court as required by R.C. 2929.03(F). (T.d. 144.)

Under R.C. 2929.05(A), we hold (1) that the evidence supported the trial jury's finding that appellant was guilty of the aggravating circumstances (murder while committing rape and aggravated burglary), and (2) that the trial court properly weighed those aggravating circumstances and the mitigating factors. Having reviewed and independently weighed all the evidence in the record and considered the offense and the offender, we determine and hold that the aggravating circumstances the appellant was found guilty of committing outweigh the mitigating factors beyond a reasonable doubt.

IV

Our duty to determine whether the death sentence is "appropriate" is set forth in R.C. 2929.05(A), as follows:

> The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine * * * whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases * * * The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record * * * that the sentence of death is the appropriate sentence in the case.

The "appropriateness" of any death sentence must be determined under the overall principle that the death sentence is, in the judgment of the Ohio General Assembly, speaking for the people of Ohio, an appropriate sentence in certain particularized circumstances and that the Ohio statutory framework for imposing it in a way that considers all aggravating circumstances and mitigating factors relevant to the offense and the offender meets all constitutional requirements. The principal considerations required by statute are whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases.

As to the universe of "similar cases," the Supreme Court has instructed that we need not include criminal cases outside our geographical jurisdiction (Hamilton County), *Rogers, supra*, paragraph nine of the syllabus, that we must compare the death sen-

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tence under consideration with our own prior decisions and with all sentencing opinions filed in this court by the trial courts in our jurisdiction under R.C. 2929.03(F), and that we do not take into consideration "sentences in non-capital murder cases," Jenkins, *supra*, 15 Ohio St. 3d at 209, 479 N.E.2d at 304. We interpret "non-capital murder cases" to refer to two types of murder cases we exclude from review: (1) those in which the accused is not charged with any aggravating circumstances the presence of which permits the imposition of a death sentence; and (2) those in which the accused is charged with a death-sentence aggravating circumstance but the jury has recommended life imprisonment with parole eligibility in twenty or thirty years (because in such a case, the trial court does not issue separate findings and opinions under R.C. 2929.03[F]). We believe we must consider cases in which the defendant pleads guilty to a count or counts of aggravated murder with a specification or specifications of aggravating circumstances but the three-judge panel is not unanimous that the aggravating circumstances outweigh the mitigating factors and imposes a life sentence, because in such instances a sentencing opinion is required under R.C. 2929.03(F). Accordingly, we conclude that the universe of similar cases which we must consider includes three classes of cases: (1) cases decided by the Supreme Court and officially reported; (2) cases decided by this court; and (3) cases in which the trial court has filed a sentencing opinion under R.C. 2929.03(F).

The fact that the instant case is the first case this court

has reviewed under the Ohio statutory framework, while it may be a source of comment, does not inhibit the performance of our duty. The Supreme Court and other courts of appeals have made their decision under similar circumstances. *Jenkins, supra*, 15 Ohio St. 3d at 210, 473 N.E.2d at 304.

Accordingly, we have reviewed *Jenkins, Maurer, Rogers, Mapes* and *Martin*, and the sentencing opinions filed to this date in this court under R.C. 2929.03(F). (Included in those cases with sentencing opinions is one *State v. Ship* [appeal pending under number C-850356], in which the defendant pleaded guilty to aggravated murder with specifications, but the three-judge panel was not unanimous that the aggravating circumstances outweighed the mitigating factors and imposed a life sentence with parole eligibility after thirty years; the panel filed a sentencing opinion.)

Comparing the instant case and all the facts and circumstances disclosed by the instant record about the offenses and the offender with all those cases, we hold that the imposition of the death sentence in the instant case is neither excessive nor disproportionate, and that it is appropriate.

V

In conclusion, we first find that there is no merit to any of the specific issues raised by the appellant concerning the jury trial resulting in his conviction of the crimes described. Second, we find that the aggravating circumstances outweigh beyond a reasonable doubt any and all mitigating factors attempted to be presented by the appellant. Third, we find the

sentence of death to be appropriate in this case, as it is neither excessive nor disproportionate to the penalty imposed in similar cases. Thus, in accordance with R.C. 2929.05(A), we affirm the conviction and sentence of death in this case.

Accordingly, the judgment of the trial court is affirmed.

KLUSMEIER and HILDEBRANDT, JJ., CONCUR.
BLACK, P.J., DISSENTS IN PART, CONCURS IN PART.

BLACK, P.J.

I respectfully dissent from the affirmation of appellant's conviction of aggravated burglary, because I believe that under the Supreme Court's interpretation of the "trespass" required to be proved for a violation of the burglary statutes (R.C. 2911.11, 2911.12 and 2911.13) as set forth in *State v. Barksdale* (1983), 2 Ohio St. 3d 126, 443 N.E.2d 501, the evidence was insufficient as a matter of law to prove that appellant "trespassed" in the Range's residence, and therefore the trial court incorrectly instructed the jury on the element of "trespass." These issues are discussed in Subpart II(C) of the majority's decision, beginning on page 12, *supra*. I would sustain the eleventh and twelfth assignments of error. This would lead to reversal of the judgment and sentence for aggravated burglary, without however disturbing the judgments and sentences for aggravated murder (count 1) while committing rape (specification 1) and rape (count 2), including the death sentence.

I am of the opinion that the Supreme Court's decision in *Barksdale, supra*, is applicable and binding in this case. The Court held that an individual implicitly invited to come onto business premises (a car lot) does not become a "trespasser" solely because he commits a felony while there. This approach led the Court to uphold the reversal of a conviction for breaking and entering, R.C. 2911.13, because that offense requires a trespass, and no trespass was involved in the defendant's entry upon a used car lot although he may have entered with the intent to commit a theft. As noted in the dissent in *Barksdale, id.* at 130, 443 N.E.2d at 504, and in *State v. Lyons* (1985), 18 Ohio St. 3d 204, 480 N.E.2d 767, this effectively removes the element of "remain" from the definition of trespass found in R.C. 2911.21(A)(1).

Applying this analysis to the meaning of "trespass" in the aggravated burglary statute, R.C. 2911.11, I believe that in the instant case, the prosecution had to prove beyond a reasonable doubt that appellant entered the victim's residence without privilege (*i.e.*, without consent), and that the entry was by force, stealth or deception. Nevertheless, four months after *Barksdale*, the trial court instructed the jury as quoted at page 13, *supra*, allowing the jury to find that any remaining on the premises was equivalent to an unlawful entry. This was error. The twelfth assignment of error, in my judgment, has merit.

Furthermore, the evidence is insufficient to prove that ap-

pellant entered without "privilege": that is, that he entered without Karen's consent. Setting aside appellant's statement that she allowed him to enter the house to demonstrate the cleaner on a spot in the rug, we find nothing else in the record to prove beyond a reasonable doubt that appellant's entrance was by force, stealth or deception. "Deception" is a possibility, but the evidence is too scanty, I believe, for reasonable minds to conclude beyond a reasonable doubt, *State v. Eley* (1978), 56 Ohio St. 2d 169, 383 N.E.2d 132, and *State v. Bridgeman* (1978), 55 Ohio St. 2d 261, 381 N.E.2d 184, that appellant had, prior to entry on the Range premises, formed an intent to rape or to kill Karen but concealed that intent by deception. See *State v. Ware* (1990), 63 Ohio St. 2d 84, 406 N.E.2d 1112, for evidence sufficient to prove deception. The evidence suggested the contrary: that appellant's sexual and murderous attack on Karen was sudden and instantaneous, developing from events after his entry.

I cannot agree with the majority that "[i]t is patent that the victim of the instant crime must have ordered the appellant to leave her home when his conduct first became suspect." Page 16 *supra*. Withdrawal of consent is not patent in the record before us. If withdrawal of consent is necessary to establish a "trespass," then it must be proved beyond a reasonable doubt, as must all the other essential elements of the offense.

Therefore, I would find merit in appellant's eleventh assignment of error in which he asserts that the evidence was insufficient to support the conviction of aggravated burglary.

that conviction should be reversed, as well as the sentence for that offense.

My conclusions do not, however, require that the other convictions or the other sentences must be set aside. My conclusions do not disturb either the conviction of aggravated murder with one specification or the sentence of death.

A conviction of felony murder under R.C. 2903.01(B) requires proof of only one of the listed felonies. As is explained in Subpart II(D) of the majority decision, appellant's conviction of rape is valid, as is the jury finding that the purposeful murder was committed while appellant committed rape. Aggravated murder under R.C. 2903.01(B) requires proof of any one of certain felonies, and a conviction will survive the failure of proof of any one or more felonies so long as at least one felony is proved beyond a reasonable doubt. Appellant's conviction of aggravated murder under the first count and of committing it while committing rape under the first specification to that count is affirmed. The eighteenth assignment of error has no merit, because the conviction of aggravated murder can stand on the proof of rape. (The language of the eighteenth assignment is inapt because it does not expressly assert what the error was, but in the interest of justice, I interpret it to claim that since the proof of <u>both</u> aggravated burglary and rape was insufficient, the trial court erred in convicting appellant of aggravated murder under R.C. 2903.01[B], and that the conviction must be reduced to murder.)

The failure of proof of aggravated burglary does not, in my judgment, require a reversal of the sentence of death and a remand of this cause for further proceedings. (The further proceedings would necessarily have to be an entirely new trial, bifurcated into the guilt and the sentencing phases, because the original jury has been discharged.) Ohio's statutory framework requires proof of only one aggravating circumstance for the imposition of the ultimate penalty of death. R.C. 2929.03 and 2929.04 repeatedly refer to "one or more" of the eight aggravating circumstances, proof of which subject the offender to jeopardy of the death sentence. The Supreme Court has decided that the sentence of death may be supported by only one aggravating circumstance. In *Jenkins, supra*, 15 Ohio St. 3d at 208, 473 N.E.2d at 303, the court said: "We also note that only one aggravating circumstance need be proved to subject appellant to the possibility of a sentence of death." In *Mapes, supra*, 19 Ohio St. 3d at 112-13, ___ N.E.2d at ___, the court upheld the death penalty although the jury found that the defendant was not guilty of two out of three specifications. See, also, *State v. Perryman* (1976), 49 Ohio St. 2d 14, 26, 358 N.E.2d 1040, 1048, *vacated on other grounds* (1978), 438 U.S. 911, 98 S. Ct. 3136 (conviction of aggravated murder not dependent on guilt as to specifications); *State v. Clark* (1980), 126 Ariz. 428, 436-37, 616 P.2d 888, 896-97 (imposition of death penalty not defeated by failure of one of three aggravating circumstances), *certiorari to Supreme Court of Arizona denied* (1980), 449 U.S. 1067, 101 S.

St. 796.

In addition, I would hold that appellant is not prejudiced by the elimination of the offense of aggravated burglary as an "aggravating circumstance" to be considered in weighing the remaining aggravating circumstance of rape against the mitigating factors in the sentencing phase of this capital trial, for two reasons: (1) the operative facts and circumstances of the rape are the same as the operative facts and circumstances of the erroneously considered aggravated burglary, or to state it otherwise, the fact that appellant's entry was with Karen's consent does not change in any significant way the aggravated circumstances of murder during the commission of rape; and (2) both reviewing courts must independently weigh these circumstances and facts and reach their separate conclusions about which outweighs the other. I would find no merit in the second assignment of error, in which appellant maintains that the imposition of a death sentence violated his constitutional rights because it was "imposed herein in reliance on an aggravating factor * * * on which there was insufficient evidence."

I would also find no merit in the seventeenth assignment of error, in which the claim is repeated that the death sentence cannot be imposed when both the alleged aggravating circumstances failed for lack of sufficient proof. We have found that there was sufficient proof of the rape, as set forth in Subpart II(D) of the majority decision.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX

Location in Section II of the discussion and disposition of the twenty-eight assignments of error

Assignment of Error	Subpart	Beginning on Page
First	II(A)	7
Second	II(C)	12
Third	II(H)	23
Fourth	II(H)	23
Fifth	II(H)	23
Sixth	II(H)	23
Seventh	II(H)	23
Eighth	II(F)	21
Ninth	II(A)	7
Tenth	II(E)	18
Eleventh	II(C)	12
Twelfth	II(C)	12
Thirteenth	II(D)	16
Fourteenth	II(D)	16
Fifteenth	II(D)	16
Sixteenth	II(D)	16
Seventeenth	II(C)	12
Eighteenth	II(C)	12
Nineteenth	II(H)	23
Twentieth	II(I)	31

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Twenty-first	II(I)	31
Twenty-second	II(I)	31
Twenty-third	II(B)	9
Twenty-fourth	II(B)	9
Twenty-fifth	II(H)	23
Twenty-sixth	II(H)	23
Twenty-seventh	II(G)	22
Twenty-Eighth	II(H)	23

Since the date of arraignment the docket sheet reflects an extensive process of trial preparation. It also reflects a plea of not guilty by reason of insanity and the evaluations of professionals appointed by the Court. Numerous motions were filed before and during trial. They were heard and ruled upon during the course of the pretrial preparation, during the course of the guilt or innocence trial and the sentencing proceeding. All rulings on said motions are reflected either on the docket sheet of the case, directly on the face of the motion or on the record.

GUILT OR INNOCENCE TRIAL

The guilt or innocence trial of the defendant, David Joseph Steffen, commenced on April 25, 1983, with the process of jury selection from a special venire of seventy-five (75). On April 29, 1983, the jury was empaneled and sworn, after a second special venire of seventy-five (75) had been summoned and partially used. The jury finally selected consisted of twelve regular members and five alternates. On the regular panel of the jury, there were ten women and two men. None of the alternates had to be used although they were kept intact and not discharged until after the verdict on the sentencing proceeding was read in open court and the regular panel discharged. The Court elected to retain the alternates until the regular panel was finally discharged in order to assure that no mistrial might have to be declared while the regular panel was deliberating on the sentencing recommendation if then a member of the regular panel should become ill or need to be excused because of some other personal reason.

On May 2, 1983, the State commenced its case by producing evidence on the charge of Aggravated Murder as set forth in the First Count of the indictment, evidence as to each of two specifications of aggravating circumstances as to the first count, and evidence on the charges of rape and aggravated burglary as charged in the second and third counts.

During the course of the guilt or innocence trial, the State of Ohio presented twenty-one (21) witnesses and the defense presented fourteen (14) witnesses. The thrust of the State's case was designed to prove the elements of the aggravated murder Count as well as the elements of the specifications alleged. The thrust of the defense case was to present the defense of not guilty by reason of insanity.

There was absolutely no doubt that David Joseph Steffen was the sole perpetrator of the murder. He took the stand and admitted killing Karen Range and he acknowledged that no one else was present. The disputed questions the jury had to determine were whether or not he committed or attempted to commit the rape alleged and whether or not he was insane at the time of the commission of the offenses.

After receiving instructions of law from the Court which were applicable to the guilt or innocence issue in the first trial and, upon due deliberation, the trial jury did, on May 17, 1983, find the defendant guilty of aggravated murder as charged in the First Count of the indictment, and also found the defendant guilty of the two specifications contained in the indictment as they pertained to the first count.

The aggravating circumstances which the defendant, David Joseph Steffen was found guilty of committing were that he was the sole perpetrator of the aggravated murder and committed said aggravated murder:

(1) While committing or attempting to commit rape, and

(2) While committing or attempting to commit aggravated burglary.

Before receiving and reading the jury's verdict in open court, the Court allowed the alternate jurors, who were sequestered separately, to fully examine the exhibits admitted into evidence. This was done in order to assure that the alternate jurors had seen and heard exactly the same evidence the regular jurors had before it in reaching their verdict, so that if an alternate juror had to be pressed into service in the sentencing proceeding that alternate juror could join the deliberative process with exactly the same exposure to evidence as the regular jurors.

SENTENCING PROCEEDINGS

On May 20, 1983, after a two day break in the proceedings which was necessary in order to have prepared and filed both a mental examination and a presentence report as requested by the defendant, the second stage of this matter, hereinafter referred to as the Sentencing Proceedings commenced, pursuant to O.R.C. §2929.03(D).

It should be noted that all of the jurors were sequestered from the time the regular jurors retired to commence their deliberations on guilt or innocence throughout the two-day break in the proceedings and during the entire sentencing proceedings.

At the sentencing proceedings the Court reversed the traditional trial procedure ordering defendant to proceed first and allowing defendant to have two closing arguments. This reversal of procedure did not, in any way, alter the burden of proof placed upon the State, as the instructions of the Court indicated. The original trial jury, still intact, heard additional testimony, an unsworn statement by defendant, and the arguments of respective counsel relative to the factors in favor of and in mitigation of the sentence of death.

After receiving the instructions of the Court as to the applicable law in the sentencing proceedings, and upon due deliberation, the trial jury, on May 20, 1983, returned its verdict and found, unanimously, that the State of Ohio proved by proof beyond a reasonable doubt that the aggravating circumstances which the defendant David Joseph Steffen was found guilty of committing were sufficient to outweigh the mitigating factors in this case. The jury recommended in its verdict that the sentence of death be imposed as mandated by the provisions of O.R.C. §2929.03(D)(2).

The Court then discharged all the jurors and continued the case until May 25, 1983, in order to personally review Seventy-seven (77) exhibits, and four hundred three (403) pages of notes taken by the Court, before imposing sentence.

IMPOSITION OF SENTENCE PROCEEDINGS

On May 25, 1983, the Court proceeded to impose sentence pursuant to O.R.C. §2929.03(D)(3). On that same date, the Court announced that its written opinion would be filed within fifteen (15) days as required by O.R.C. §2929.03(F).

This Court found by proof beyond a reasonable doubt, upon a review of the relevant evidence in both trials, the testimony, exhibits, statement of the defendant, not under oath, arguments of respective counsel, along with the presentence report and mental examination report requested by defendant, that the aggravating circumstances which the defendant, David Joseph Steffen, was found guilty of committing did outweigh the mitigating factors in the case and, therefore, on May 25, 1983, this Court imposed the sentence of death upon the defendant, David Joseph Steffen, ordering said execution to take place on September 26, 1983.

OPINION

The provisions of O.R.C. §2929.03(F) now require this Court to state in a separate opinion the Court's specific findings as to the existence of any of the mitigating factors specifically enumerated in O.R.C. §2929.04(B) or the existence of any other mitigating factors, and also requires the Court to state reasons why the aggravating circumstances that the offender was found guilty of committing were sufficient to outweigh the mitigating factors, since that is what the Court has in fact found by imposing the death penalty. In other words the Court must put in writing the justification for its sentence.

In meeting its responsibility under the statute, the Court will review all mitigating factors described in O.R.C. §2929.04(B) as well as any other mitigating factors raised by the defendant and will indicate what conclusions were reached from the evidence as to each. Those possible mitigating factors specifically set forth in the statute are as follows:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevent to the issue of whether the offender should be sentenced to death, and

(8) The nature and circumstances of the offense, the history, character and background of the offender.

The Court will first, however, review the aggravating circumstances which the defendant has been found guilty of committing and will indicate why the jury's conclusions on these matters was correct.

AGGRAVATING CIRCUMSTANCES

The aggravating circumstances that the defendant, David Joseph Steffen, was found guilty of committing are as follows:

(1) Aggravated murder was committed while David Joseph Steffen was committing or attempting to commit rape, and the said David Joseph Steffen was the principal offender in the commission of the aggravated murder at the time the rape was committed or attempted.

(2) Aggravated murder was committed while David Joseph Steffen was committing or attempting to commit aggravated burglary and the said David Joseph Steffen was the principal offender in the commission of the aggravated murder at the time the aggravated burglary was committed.

In deliberating upon its decision in this case as required by O.R.C. §2929.03(D)(3), the Court placed itself in the same position as if it were one of the members of the jury panel. The Court evaluated all of the relevant evidence raised at both trials, the testimony, other evidence, unsworn statement of the defendant, and the arguments of respective counsel along with the presentence report and mental examination report requested by defendant, all of which had been available to the jury in its deliberations at various stages of this case.

The principles of law which guided this Court are contained in the written jury instructions provided to the jury during the two trials and which are part of the transcript. The evidence and testimony were tested by the Court from the viewpoint of credibility and relevancy to the existence of aggravating circumstances along with their qualitative and quantitative measure. The crimes of rape and aggravated burglary were deemed by the General Assembly of the State of Ohio to be among the most serious when a general revision of the

criminal code was made on January 1, 1974. For sake of punishment, these crimes are second only in severity to the crime of murder. These two crimes separately stated are first degree felonies. In O.R.C. §2929.04, the General Assembly mandated the imposition of the death penalty for an aggravated murder committed during commission of one of these offenses.

In the guilt or innocence trial, at which defendant testified under oath, in the sentencing proceedings, in which the defendant made an unsworn statement and with statements of defense of counsel in argument to the jury, there was never a denial in any respect that the defendant was the sole and principal perpetrator of the offense charged in the first count of the indictment. A complete review of the evidence pertaining to count one and the specifications of aggravating circumstances as to count one reveals to this Court beyond any doubt that the murder was committed by the defendant and by he alone.

Furthermore, the Court concludes that the defendant's version of the events with his careful denial of any sexual activity does not conform to the physical evidence presented. The severely bruised and battered body of Karen Range, the condition of the victim's clothing, the physical location of a bra snap found in the wash bowl, the presence of semen in her vagina and in her panties, the presence of spermatozoa in the semen, the presence of a telltale drop of blood in her pubic hairs, the presence of defendant's hair strands on the blouse of the victim all provide ample demonstrative evidence that the defendant did in fact engage in sexual conduct with the victim at sometime during this tragic incident.

Furthermore, it is beyond any doubt that at some point in time the defendant began beating Karen Range. This he acknowledged under oath. At the moment he started beating her he was no longer an invited guest in the victim's home, if in fact he was ever an invited guest and anything he did thereafter to the victim was as a trespasser, under the law.

It was, therefore, the Court's conclusion upon a full and complete review of all of the relevant evidence that there was proof beyond a reasonable doubt that the defendant committed a rape; that he killed Karen Range while committing that rape and further that he was a trespasser in her home at the time that he began assaulting and sexually attacking her which constituted the crime of aggravated burglary as defined in the instructions.

MITIGATING FACTORS

The Court will now review all possible mitigating factors indicating whether or not they were present and if so what, if any, consideration the Court gave to them. Those listed in O.R.C. §2929.04(B) are as follows:

(1) "Whether the victim of the offense induced or facilitated it." The Court finds absolutely no evidence whatsoever to suggest that Karen Range in any respect induced or facilitated the offense. This factor was not present.

(2) "Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or stong provocation." Again, the Court finds absolutely

no evidence of any nature that would suggest that the defendant was under duress, coercion or strong provocation. This factor was not present.

The Court will consider the third possible mitigating factor as set forth in O.R.C. §2929.04(B) at the conclusion of its discussion of mitigating factors four (4), five (5) and six (6).

(4) "The youth of the offender." The Court finds that the defendant was born December 22, 1959, and at the time of this trial was twenty-three years of age. There is absolutely no evidence to suggest that he was a youthful offender or that his age was a factor that should be taken into account in mitigation of the sentence of death. This factor was not present.

(5) "The offender's lack of a significant history of prior criminal convictions and delinquent adjudications." The record in this case, including the exhibits offered by the defense and the testimony which the Court has considered indicates that the defendant, David Joseph Steffen, had a significant history of convictions and adjudications of delinquency for a variety of acts and that these convictions and adjudications of delinquency extend over a significant period of time. Therefore the Court would be precluded from giving the defendant consideration pursuant to mitigating factor number five. In fact his prior history of criminal activity would be more aggravating than mitigating.

(6) "If the offender was a participant in the offense but not the principal offender the degree of the offenders participation in the offense and the degree of the offenders participation in the acts that led to the death of the victim." The Court finds in this

case that there was absolutely no evidence to suggest that any other person was involved in the rape, aggravated burglary and murder of Karen Range, other than the defendant, David Joseph Steffen. Therefore, this factor was not present.

In summary, based upon the relevant evidence presented, possible mitigating factors number one, two, four, five and six, described in O.R.C. §2929.04(B) were not present, and could not be the subject of any consideration by this Court as it relates to mitigation of the penalty of death.

The Court now reviews the remaining possible mitigating factors enumerated in O.R.C. §2929.04(B) along with a "consideration of the nature and circumstances of the offense, the history, character and background of the defendant," which the Court will consider as number eight (8). They are the following:

(3) "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

(7) "Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

(8) "The nature and circumstances of the offense, the history, character and background of the offender."

The nature and circumstances of this offense appear clear to the Court. Therefore, it will not be the Court's intention to reiterate in this opinion each and every sordid detail of the afternoon and early evening hours preceding the death of Karen Range. The eye witness testimony of her mother, the testimony of police

officers, criminalists and deputy coroner who came upon the scene in the later hours of the evening and thereafter revealed for the jury and for this Court a gruesome scenario. It is quite clear that Karen Range was found on the floor of a bathroom of her home, blood splattered everywhere, her throat viciously slashed, her face a mass of bruises, her clothes ripped apart exposing her breasts and pubic region and revealing what appeared to be shoe prints on her chest. Alongside her lifeless body lying in a pool of her blood was the knife that was used to bring about her death.

In the words of the defendant, the only living witness to the incident, Karen Range watched the defendant, David Joseph Steffen, demonstrate a cleaning fluid he was attempting to sell. They were in close proximity and as defendant arose from a kneeling or crouching position he brushed against the deceased breast and she began to scream. The defendant relates his attempt to stop her from screaming without success and after beating her unmercifully and attempting to shove a dirty rag in her mouth, he got a paring knife from the kitchen and cut her throat four or five times so deeply that he cut all the vital organs in the neck back to the spine. The defendant asserts that he had no intention of raping the victim, but after she started screaming something went off in his head, he beat her, ripped clothes off her, then slashed her neck and killed her, after which he asserts he was so angry at her for what her screaming had caused him to do that as an act of revenge he thought of raping her, but could not get an erection. The defendant's attorneys asserted several times that the only living person who knows what actually happened that fateful day is the defendant and therefore his

version of the facts must be accepted. This argument is not persuasive. The defendant does not have to be believed. The true circumstances of the offense can be gleaned from the testimony of the State's witnesses who described the scene, the victim's condition, the condition and location of her torn clothes and the presence of semen both in the victim's vagina and in her panties and the presence of spermatozoa. There is ample evidence to indicate the very sordid nature of the offense and its specific consequences.

It should be noted, from the defendant's appearance in the courtroom that he was physically over-developed. He had a massively well developed chest and upper arms. It is evident that he either exercised regularly or worked out on muscle developing equipment. He looked every bit the part of an extremely strong person even though he wore glasses, suggesting that he had very poor eyesight and spoke very softly. The last moments in the life of Karen Range, in that small bathroom, and in very close proximity to the defendant, it must logically be inferred were filled with horror and pain.

The history, character and background of the defendant, David Joseph Steffen, are very closely interrelated with the two remaining mitigating factors to be discussed and will be interspersed with a discussion of these specific factors argued in mitigation.

The jury had, and the Court has reviewed, a substantial volume of material regarding the background of the defendant, David Joseph Steffen. It seems unnecessary in this opinion to repeat all of the pertinent factors of his background that may have impacted upon his conduct this fated day. The Court is well aware that all of these documents will be a part of the record that will be reviewed by

the appellate courts and therefore will simply summarize what it deems to be some pertinent aspects of this defendant's history and background.

It is not disputed that the defendant, David Joseph Steffen, led an aimless and unhappy life. At about age eight or nine, after what appears to have been a rather stormy home life he was sent to Parmadale Children's Village, and then to Hawthornden State Hospital. While living in these institutions and others he developed significant antisocial or personality disorder characteristics. Upon his release from the final institution, a state prison in Indiana, his life continued to be meaningless. During the few years when he was not institutionalized he drifted from one place to another becoming involved with the law time after time. Virtually all of his illegal activities arose as a result of his incorrigible conduct. At no time does it appear that he ever intended to conform to the rules of society. He seems to have dealt with his lack of roots either by moving to another state or by being housed in one or another institution. The evidence is very clear that throughout his wanderings he presented the picture of a social outcast, with little desire to settle down and a person with very minimal skills for self support. Even so, his testing over the years placed him in a range of normalcy and his ability suggested that he functioned at the average range for a person his age. He secured a high school equivalent diploma (GED) while in prison in Indiana and served as a tutor for a period of time. However, when he was released from this insti-

tution he drifted in and out of trouble wherever he found himself. He possessed only the desire for immediate gratification and self-preservation.

The history of wandering evidenced by the testimony and exhibits in this case finally brought him to Dayton, Ohio, in the fall of 1982, seeking comfort and shelter from a brother. After a short stay with this brother, he secured employment with a traveling sales group and found himself in Cincinnati on the fatal day in question. While it is absolutely clear that he never intended to establish any roots, he was able to secure casual work periodically which allowed him to function at a minimal level.

While the Court recognizes that all of the records in this case indeed indicate the defendant had a very tragic and unfortunate upbringing, with no love or parental guidance, with large doses of bizarre and abusive punishment and with constant negative reinforcement of his personality, the Court is also satisfied that the records, testimony and evidence, reflect conclusively that the defendant has never suffered from a mental disease or defect which would have prevented the defendant from distinguishing right from wrong or would have prevented him from conforming his conduct to the requirements of the law. In other words the defendant has never suffered from any psychosis. Instead, he has been diagnosed over many years as having a borderline personality disorder which manifests itself in all types of antisocial behavior. This disorder is not a product of a mental illness or disease, so says the overwhelming weight of the professional testimony.

It is true, that the defendant was afflicted with deficiencies of personality which suggested that he was destined to get into trouble. However, those same personality characteristics which allowed him to live and work within a community and society in a peaceful fashion when he chose to, compels this Court to a conclusion that the defendant functioned as a rational being during the period of time surrounding the criminal activity of which he has been convicted.

This is not to say that the defendant was a totally normal human being. Time and time again professionals diagnosed him as having problems; of being a problem; of showing little motivation; of being a constant troublemaker and of being a nonconformist. He manifested a passivity which at times could be deceiving. But throughout his life, his true personality reflected a desire to do his thing whenever he wished regardless of the consequences.

In considering whether or not the defendant, at the time of committing the offense because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, the Court reviewed the expert testimony of Drs. James Tichener, Emmett Cooper, Donna Winter and the mental examination reports of Drs. Roger Fisher and Nancy Schmidtgoessling. Their collective and lengthy testimony and reports offer credible and compelling testimony in the case with respect to the sanity of the defendant. They all characterized the defendant as not having a mental disease or illness and not being psychotic. They all found the defendant to have personality problems

and classified him in the lexicon of the profession as being a behavioral problem which was not due to any mental illness or disease.

As an example, Dr. Donna Winter, a clinical psychologist, found that the actions of Mr. Steffen were entirely self-serving, very specific and not stereotyped. Dr. Winter pointed out that the defendant after admitting what he had done, had complete and total recall of the incident even to the extent of saying that he did intend to rape his victim, but then suggesting that he could not sustain an erection. This very careful differentiation between two criminal acts which if both proven makes out a death penalty case, was calculated and measured to draw the distinction between a penalty of death or life.

Dr. Donna Winter describes the defendant as having a borderline personality disorder; that he was not mentally ill but that she saw more disturbance of functioning than is normally seen in personality disorders. She described a borderline personality disorder as one having an unstable mood; a person who can be very depressed and quickly resumes to feeling fine and happy and become very depressed again. The relationships with others are poor for such an individual, and there is instability there. They can be very fond of somebody one day and be very much against them the next, but the main thing with a borderline personality disorder is that the main emotion the person feels is anger. Dr. Winter indicated that while Mr. Steffen was out of control at the time of his attack on Karen Range, and his ability to refrain from the act may have been seriously impaired, that inability to refrain was not the result of mental

illness or mental disease or mental defect. It was the result of being in a rage. The Court believes this rage was precipitated by the victim's rejection of the defendant's advances.

Dr. James Titchener, a psychiatrist, said that he felt the defendant was in the range of borderline personality disorder. He described this as a disorder which affects personality adjustment. It consists of problems in interpersonal relations, and problems in self-identity, and organization of thought, and in control of the emotions. Dr. Titchener agreed that the attack was a senseless one in terms of the reasons the defendant expressed for doing these acts, if these reasons are believed. Nevertheless, Dr. Titchener testified that he felt there was no mental disease or defect which would impair the defendant's capacity to differentiate between right and wrong at the time of the offense.

Dr. Emmett Cooper, a psychiatrist, reached the same conclusion as Dr. Titchener and Dr. Winter concerning the nature of the defendant's problems and the medical conclusion that the defendant was not suffering from a mental defect or illness at the time of the event which would have prevented him from conforming his conduct to the law or from knowing the difference between right or wrong.

Drs. Roger Fisher and Nancy Schmidtgoessling, clinical psychologists, reaffirmed and reiterated the same diagnosis and conclusions as the above in their written reports provided at the request of the defendant and submitted to the jury for its consideration.

This Court is therefore compelled to the conclusion that there was no evidence that the offender in this case, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The defendant was alone and in close proximity to a young lady who may have excited him by her very presence and appearance. He touched her breast with his head in some manner as the presence of his hair folicles on her blouse affirm; he accousted her and assaulted her unmercifully and her efforts to resist him caused his uncontrolled rage to commit this terrible offense.

In arriving at this conclusion it should be noted that the Court also examined the testimony of Dr. Robert W. Noelker who was called as a defense expert witness. Upon careful examination of Dr. Noelker's testimony this Court is satisfied that Dr. Noelker, when rendering his opinion in this case, was careful to walk a very fine professional line. He was willing to acknowledge a similar diagnosis as his other professional colleagues, that is a borderline personality disorder, but sought to go further in suggesting that the impact of the defendant's earlier years caused him to also suffer from a mental disease or defect known as atypical dissociative disorder, 300.15, DSM-III. He felt that the stress of the incident caused the defendant to lose touch with reality. Although he didn't verbalize it in exactly this fashion, he was want to suggest that a form of temporary insanity situation occurred which was caused by the screaming of the victim. The jury chose not to accept this theory of mental illness and this Court believes the jury was correct. There-

fore, the testimony of Dr. Noelker, on the issue of the insanity of the defendant at the time of the commission of the crimes was rejected.

The Court now moves to a discussion and examination of any other factor that may be relevant to the issue of whether the defendant should be spared from a sentence of death. The intelligence of the defendant, David Joseph Steffen, has never been questioned by either side in this case. It is readily apparent that the defendant functioned in a normal range for his age. It was clear that his lack of ambition and motivation rather than lack of basic intelligence, is what caused him to hold menial jobs, usually for no great period of time. It is clear that most of his life was institutionally oriented. But this fact alone certainly cannot excuse his conduct. There was some vague suggestion that a fall down some stairs the night before and the removal of a tiny piece of metal from his neck may have, in some way, contributed to his conduct. However, no evidence to develop this theory was ever offered. The defendant sat through this lengthy trial very passively showing no visible emotion except when his sister and brother testified about the abuses in their childhoods. Although the defendant showed little emotion during the trial, the Court took note of the fact that the defendant consulted with his attorneys often during the trial and used pen and pad at frequent times while witnesses testified.

Finally, the issue of a polygraph examination was raised. Several motions for a polygraph examination were made by the defendant. None were made prior to trial. However, a motion was made during the selection of the jury, then again during the first trial,

again between trials, again during the sentencing proceeding and once again immediately before sentencing. In addition, the defendant in his unsworn statement told the jury he was willing to take a polygraph examination to support his contention that no rape took place. To all of the motions, the State objected. The Court in a written decision made part of the record denied the first motion for a polygraph examination for the primary reason that a plea of not guilty by reason of insanity had been entered in this case and there was no evidence offered by defendant to indicate that the art of polygraph examinations of a person who asserts a mental illness or disease has reached a sufficient degree of scientific acceptability to be admissible in evidence at a trial. For the same reason the Court denied each subsequent motion for a polygraph examination. The Court was careful to make certain, each time the polygraph motion was made, that it was being requested for evidentiary purposes and not just for private use by defendant and his counsel either for investigative purposes, for trial preparation, or for strategy purposes. The Court also instructed the jury to disregard defendant's unsworn statement as it pertained to his offer to take a polygraph examination. The Court advised the jury that it had decided, as a matter of law, that the defendant could not have such an examination for the purpose of offering the results into evidence. This dissertation on the issue of the polygraph is included so as to alert the appellate courts that even if the offer to take a polygraph examination or the

results thereof could be considered a mitigating factor at the sentencing trial before the jury or at the sentencing proceeding by the Court, it was denied for the reasons above stated and more fully explained in a written decision incorporated in the record.

The Court recognized that the death penalty is the most severe penalty that can be imposed by man against man and that it should only be imposed after a most careful and meticulous review of the facts and law have taken place. It is believed that such an evaluation of the facts and law in this case had been undertaken by this Court in reaching its decision.

CONCLUSION

The sole issue which confronted the Court is stated as follows:

> DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT, DAVID JOSEPH STEFFEN, WAS FOUND GUILTY OF COMMITTING OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?

In this regard all of the statutory mitigating circumstances and all other possible mitigating factors raised by counsel have now been reviewed and discussed. The same has been done with the aggravating circumstances.

Upon full, careful and complete scrutiny of all the mitigating factors set forth in the statute or called to the Court's attention by defense counsel in any manner and after considering fully the aggravating circumstances which exist and have been proven beyond a reasonable doubt, the Court concludes that the aggravating

circumstances do outweigh all the mitigating factors advanced by defendant beyond a reasonable doubt as required by O.R.C. §2929.03(D)(3).

For all the above stated reasons the recommendation of the trial jury was adopted and the sentence of death was imposed upon the defendant David Joseph Steffen on May 25, 1983.

Respectfully submitted,

Robert S. Kraft, Judge

APPENDIX D

§ 2901.04 Rules of construction.

(A) Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2907.02 Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

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§ 2927.01 Abuse of a corpse.

(A) No person, except as authorized by law, shall treat a human corpse in a way that he knows would outrage reasonable family sensibilities.

(B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.

(C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fourth degree.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.-02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

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(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

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§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY: 134 v H 511 (Eff 1-1-74; 139 v S 1, Eff 10-19-81.

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§ 2929.05 [Appellate review of death sentence.]

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

Any court of appeals that reviews a case in which the sentence of death is imposed shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

(C) Whenever sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(2) The offender did not present evidence at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced.

HISTORY: 139 v 51. Eff 10-19-81.

§ 2929.06 [Resentencing hearing after vacation of death sentence.]

If the sentence of death that is imposed upon any offender is vacated upon appeal because the court of appeals or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

§ 2945.25 Causes of challenging of jurors.

A person called as a juror in a criminal case may be challenged for the following causes:

(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

§ 2941.14 Allegations in homicide indictment.

(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.

(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.

(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form:

Specification (or, *Specification 1*, or *Specification to the First Count*, or, *Specification 1 to the First Count*). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in divisions (A)(1) to (8) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same).

RULE 801. Definitions

The following definitions apply under this article:

(C) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

RULE 802. Hearsay Rule

Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

The Cincinnati Post

SCRIPPS HOWARD

Final II | TUESDAY, AUGUST 18, 1987 | 35 Cents

Harvey admits to 24 murders

Nightmarish truth unfolds for families

By Janet Welsh and France Griggs
Post staff reporters

Relatives of Donald Harvey's victims sat stunned this morning as they learned the specifics of how their family members died at the hands of a serial killer.

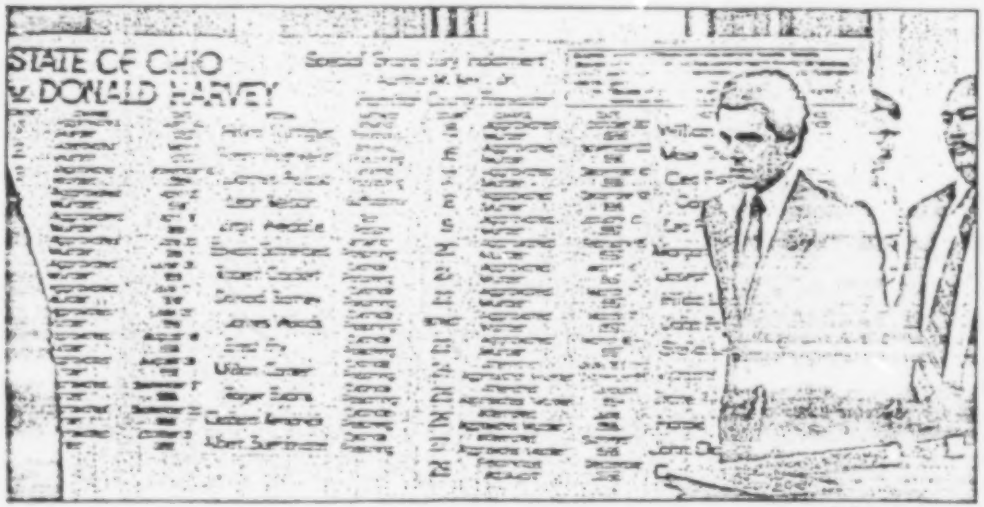
The horror of their deaths left many of them angry that Harvey's killing spree wasn't stopped sooner. They said employees of Drake Hospital, where most of the victims died, had nicknamed Harvey the "Angel of Death" because he often seemed to be nearby just before patients died.

"Donald Harvey isn't the only criminal," said Michael Pike, whose father Joseph Pike died March 6 at Drake. "There are a lot of people who knew something was going on. I'm talking about doctors and nurses who knew when he (Harvey) dealt with someone, (that person) would die."

Pike said Hamilton County did a good job in prosecuting Harvey, but he is angered by the plea bargain that preserves his life.

"He should have gone before a jury," Pike said. "I'm sure they would have given him the electric chair."

The former Drake Hospital orderly was indicted this morning on 25 [illegible]



DALE OMORI/The Cincinnati Post

Donald Harvey, accompanied by a Hamilton County sheriff's deputy, is led into court today before pleading guilty to a 29-count indictment.

Behind Harvey in Judge William S. Mathews' courtroom is a chart outlining his murders and attempted killings.





Ex-orderly sentenced to life terms

By Randy Ludlow
Post staff reporter

Donald Harvey pleaded guilty this morning to aggravated murder in the deaths of 24 people—20 of whom were patients under his care at Drake Hospital—and was sentenced to three consecutive life sentences in prison without possibility of parole until he is 95.

Harvey, 35, of Middletown, Ohio, became responsible for one of the largest serial murder cases in American history as he stood 24 times this morning and mouthed the words, "They're true," as Prosecutor Arthur M. Ney Jr. asked his response the charges.

Harvey also pleaded guilty to four counts of attempted murder and one count of felonious assault stemming from the 28-count special grand jury indictment handed down this morning.

Hamilton County Common Pleas Court Judge William S. Mathews immediately sentenced Harvey to three consecutive 20-year to life sentences, which means Harvey will have to serve 60 years in prison before he is eligible for parole.

Mathews issued concurrent sentences on the remaining charges, with the attempted aggravated murder charges carrying sentences of seven to 25 [illegible]

thing was going on. I'm talking about doctors and nurses who knew when he (Harvey) dealt with someone, (that person) would die."

Pike said Hamilton County did a good job in prosecuting Harvey, but he is angered by the plea bargain that preserves his life.

"He should have gone before a jury," Pike said. "I'm sure they would have given him the electric chair."

The former Drake Hospital orderly was indicted this morning on 24 counts of aggravated murder, four counts of attempted aggravated murder and one count of felonious assault. Harvey, 35, of Middletown, was spared the death penalty by agreeing to plead guilty to the charges.

He was sentenced to three consecutive life terms with possible parole after 60 years.

Harvey used cyanide, rat poison, arsenic, suffocation and petroleum distillate to kill his victims.

"He turned all black," Michael Pike said of his father's death. "He obviously suffocated."

Pike and his two sisters thought their father had died of pneumonia. This morning, in a Hamilton County Common Pleas courtroom, they learned it was petroleum distillate, a cleaning fluid.

As court officials erected a large poster board naming the victims and the methods of death, family members grasped each others' hands and dabbed at tears.

They fanned themselves in the steaming courtroom and clutched pamphlets from the Ohio Victims of Crime organization.

Relatives who met with county prosecutors this morning for an explanation of the indictments were introduced to various grief and crisis counselors.

"This opens up a second level of grief," said Dr. Steve Sunderland, a University of Cincinnati professor. "They were shocked.

Please see FAMILIES, 4A

Donald Harvey, accompanied by a Hamilton County sheriff's deputy, is led into court today before pleading guilty to a 29-count indictment.



Court-appointed attorney William P. Whalen Jr. talks with Donald Harvey today before Harvey pleaded guilty to 24 counts of aggravated murder, four counts of attempted aggravated murder and one charge of felonious assault. Harvey was sentenced to three consecutive life sentences in jail.

Behind Harvey in Judge William S. Mathews' courtroom is a chart outlining his murders and attempted killings.



Sherry Rudd, left, consoles her friend Geneva Weddle. Mrs. Weddle is the widow of Virgil Weddle of Norwood, a former resident of Drake Hospital and one of the 24 people Donald Harvey confessed to killing.

The victims and how Harvey killed them

Post staff report

Donald Harvey was convicted of the aggravated murder of these 24 people:

■ **Helen Metzger**, a neighbor of Harvey who died April 10, 1983, of poisoning by arsenic put in a pie. She died at Jewish Hospital.

■ **Henry Hoeweler**, 52, address unknown, a father of Harvey's roommate, died May 1, 1983. Harvey visited Hoeweler at Providence Hospital and put arsenic in Hoeweler's pudding. Hoeweler died at Providence.

■ **James Peluso**, of Newport, a brother of former Newport mayor and commissioner Johnny "TV" Peluso, an acquaintance of Harvey who died Nov. 10, 1984, when arsenic was placed in his pudding.

The remainder of the deaths occurred at Drake Hospital.

■ **Leon Nelson**, 64, 7859 Harrison Ave., suffocated April 12, 1986, after Harvey placed a plastic bag and wet towel over his nose and mouth.

■ **Virgil Weddle**, 81, 5317 Warren, Norwood, died April 19, 1986; rat poison in his dessert.

■ **Edward Schreibeis**, address unknown, died June 20, 1986; arsenic or cyanide in orange juice.

■ **Robert Crockett**, 80, 981 Burton, died June 29, 1986; cyanide injected into his intravenous tube.

■ **Donald Clifford Barney**, 61, 151 W. Galbraith Road, died July 7, 1986; cyanide in water in a gastric tube and cyanide injection into his buttocks.

■ **James Woods**, address unknown, died July 25, 1986, mixture of cyanide and water in gastric tube.

■ **Ernst Frey**, address unknown, died Aug. 18, 1986; cyanide or arsenic put in gastric tube.

■ **Milton Canter**, 85, 3715 York, died Aug. 29, 1986, cyanide and water mixture put in gastric tube.

■ **Roger Evans**, 74, 3622 Alaska, died Sept. 17, 1986, cyanide and water mixture put in

Please see VICTIMS, 4A

ment handed down this morning.

Hamilton County Common Pleas Court Judge William S. Mathews immediately sentenced Harvey to three consecutive 20-year to life sentences, which means Harvey will have to serve 60 years in prison before he is eligible for parole.

Mathews issued concurrent sentences on the remaining charges, with the attempted aggravated murder charges carrying sentences of seven to 25 years and the felonious assault count carrying an eight- to 15-year sentence.

He also was fined $10,000 on each count and ordered to pay the cost of the proceedings brought against him.

Prosecutors said the confessed serial killer and former Drake Hospital orderly suffocated one of his victims and poisoned the others with cyanide, rat poison, petroleum distillate and arsenic. In most of the cases, Harvey confessed to injecting the poisons into the gastric tubes of the helpless hospital patients under his care.

In some of the murders, Harvey urged Drake Hospital patients to drink orange juice that he had laced with cyanide.

The serial killings at Drake Hospital first came to light by an investigative report broadcast June 23 by WCPO-TV, Channel 9. Ney said Tuesday that the county coroner's office and Cincinnati Homicide Division already were investigating deaths at Drake Hospital when "one of the local news media conducted an investigation."

Although he pleaded guilty to 24 deaths today, Harvey has been linked as many as 70 deaths.

Assistant Prosecutor Joseph Dieters said the grand jury attempted to investigate Harvey's claims he also had killed patients elsewhere, including at the Veterans Administration Medical Center where he

Please see SENTENCE, 4A

1B / Despite guilty plea, case not over

Inside the Post

Computer voice warned 'Stall!' seconds before fatal jet plunge

ROSEVILLE, Mich. — A com-

ing, "Stall! Stall!" told them they were flying too slowly.

Officials close to the investi-

plane had engine failures on takeoff twice in 1986 and once in 1985. As recently as January, the plane was forced to return



Crash

From Page 1A

report said.

Northwest spokesman Redmund Tyler called that report misleading, saying the problem engine was replaced.

On April 1, 1986, the same plane, flying as Republic Flight 342 from San Francisco, lost power in its right engine and returned safely after 11 minutes, the reports said. The airline again discovered that the T-3 blades, which power the aircraft, had failed.

In November 1985, an engine turbine section failed about 80 miles from Minneapolis, forcing the plane to return, Mardis said.

Authorities were reluctant to discuss a possible cause of Sunday night's crash, the nation's second-deadliest, but said preliminary work showed no evidence of failure of either of the two engines on the plane, a McDonnell Douglas MD-80.

Cecilia Cichan, who was in critical condition today with third-degree burns over 29 percent of her body, was identified as a passenger on Flight 255 by her grandfather, who recognized her chipped tooth and purple nail polish, officials said.

"Her mother shielded her, and that is what saved her," said the grandfather, Anthony Cichan of Maple Glen, Pa.

The girl's parents and 6-year-old brother were killed in the crash just after takeoff from Detroit Metropolitan Airport on a flight to Phoenix, Ariz., and suburban Los Angeles.

Reporters today were allowed their closest view of the crash site, where the flaming aircraft skidded under three viaducts, two freeway overpasses and a train trestle.

Bodies had been removed, and police crews were collecting personal possessions in paper bags. Numerous purses, suitcases, and other personal effects could be seen amid the blackened debris, which included two large pieces of fuselage and other debris.

Authorities have yet to establish an official death count.

John Lauber, a National Transportation Safety Board member, said 152 people aboard the plane died. Northwest spokesman Kevin Whalen said 155 people might have been aboard, and at least 154 people died.

"The infant count is going up," he said. Infants generally are not ticketed on commercial airline flights.

Wayne County officials reported that two people died on the ground. Late Monday, County Medical Examiner Werner Spitz said five or six bodies were pulled from three vehicles.

Spitz said the bodies were too charred to determine the number, and it wasn't immediately clear whether he included the two earlier ground fatalities.

Sentence

From Page 1A

worked previously, but were unable to find evidence to substantiate his claims.

"If in fact other deaths do exist, people will be notified about them. These are the only indictments we are presenting. We are willing to present other evidence to a grand jury if it is uncovered," Dieters said.

Harvey did confess to other deaths not mentioned in the indictments, but Dieters said he could not disclose the number to which Harvey confessed or where they occurred.

Prosecutors said they would offer more extensive comments at an afternoon press conference.

Whalen received permission from Mathews for Harvey to remain in Hamilton County for 30 days. "There are other matters to be resolved ... I have to contact other jurisdictions," he said, in an apparent reference to deaths that may have occurred outside Hamilton County.

During this morning's hearing before Mathews, Ney said Emmanual Tanay, a Detroit psychiatrist with a national reputation, had interviewed Harvey and concluded "he was a compulsive killer ... tension built up in his body and he killed to relieve tension." The prosecutor said the psychiatrist considered the release of built-up tension as akin to a "sexual release."

Harvey, who was chatting and smiling with his court-appointed attorney William P. Whalen before a court hearing this morning, escaped the death penalty.

Mathews approved a plea bargaining agreement between the defense attorney and Prosecutor Art Ney Jr. in which Harvey would be given consecutive life prison sentences in return for guilty pleas.

Neither Harvey, the judge nor the families of victims would comment before the sentencing.

When Judge Mathews asked Harvey if he had anything to say before he passed sentence, Harvey said: "No, Sir."

Wearing a light brown suit, tan shirt, brown tie and white leather tennis shoes in Mathews' court, Harvey appeared calm as he listened to Ney detail the gruesome deaths and assaults on each of his victims. Sometimes quietly conferring with his attorney as he pointing to the papers in front of him, Harvey stood after each indictment was read.

He confessed to killing four people with arsenic, 16 with cyanide, one with rat poisoning, two with petroleum distillate and one by suffocation. He also confessed to attempting to kill three people with arsenic and one with hepatitis serum and assaulting another person with arsenic.

Tuesday's hearing began when Whalen withdrew Harvey's plea of not guilty by reason of insanity to the March 7, 1986 cyanide poisoning death of John Powell, 44, of Delhi Township, and entered a guilty plea to the aggravated murder charge. The Powell case then was consolidated with the other 28 grand jury indictments handed down this morning.

Whalen then told Mathews: "Your honor, we will enter a guilty plea to the indictment."

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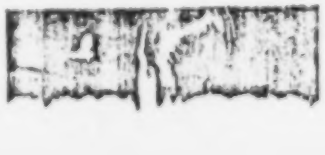
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Crash

From Page 1A

report said.

Northwest spokesman Redmond Tyler called that report misleading, saying the problem engine was replaced.

On April 1, 1986, the same plane, flying as Republic Flight 342 from San Francisco, lost power in its right engine and returned safely after 11 minutes, the reports said. The airline again discovered that the T-3 blades, which power the aircraft, had failed.

In November 1985, an engine turbine section failed about 80 miles from Minneapolis, forcing the plane to return, Mardis said.

Authorities were reluctant to discuss a possible cause of Sunday night's crash, the nation's second-deadliest, but said preliminary work showed no evidence of failure of either of the two engines on the plane, a McDonnell Douglas MD-80.

Cecilia Cichan, who was in critical condition today with third-degree burns over 29 percent of her body, was identified as a passenger on Flight 255 by her grandfather, who recognized her chipped tooth and purple nail polish, officials said.

"Her mother shielded her, and that is what saved her," said the grandfather, Anthony Cichan of Maple Glen, Pa.

The girl's parents and 6-year-old brother were killed in the crash just after takeoff from Detroit Metropolitan Airport on a flight to Phoenix, Ariz., and suburban Los Angeles.

Reporters today were allowed their closest view of the crash site, where the flaming aircraft skidded under three viaducts, two freeway overpasses and a train trestle.

Bodies had been removed, and police crews were collecting personal possessions in paper bags. Numerous purses, suitcases, and other personal effects could be seen amid the blackened debris, which included two large pieces of fuselage and other debris.

Authorities have yet to establish an official death count.

John Lauber, a National Transportation Safety Board member, said 152 people aboard the plane died. Northwest spokesman Kevin Whalen said 155 people might have been aboard, and at least 154 people died.

"The infant count is going up," he said. Infants generally are not ticketed on commercial airline flights.

Wayne County officials reported that two people died on the ground. Late Monday, County Medical Examiner Werner Spitz said five or six bodies were pulled from three vehicles.

Spitz said the bodies were too charred to determine the number, and it wasn't immediately clear whether he included the two earlier ground fatalities.

Sentence

From Page 1A

worked previously, but were unable to find evidence to substantiate his claims.

"If in fact other deaths do exist, people will be notified about them. These are the only indictments we are presenting. We are willing to present other evidence to a grand jury if it is uncovered," Dieters said.

Harvey did confess to other deaths not mentioned in the indictments, but Dieters said he could not disclose the number to which Harvey confessed or where they occurred.

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Harvey, who was chatting and smiling with his court-appointed attorney William P. Whalen before a court hearing this morning, escaped the death penalty.

Mathews approved a plea bargaining agreement between the defense attorney and Prosecutor Art Ney Jr. in which Harvey would be given consecutive life prison sentences in return for guilty pleas.

Neither Harvey, the judge nor the families of victims would comment before the sentencing.

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Mrs. Canter remembered Harvey.

"I thought at the hospital he was a nice fellow," Mrs. Canter said. "Why, he's nothing but a killer."

Mrs. Canter said she and her daughter-in-law would visit her husband at lunchtime each day at Drake, where Canter was sent after suffering a stroke. One afternoon, her husband, who sat in a wheelchair during the day, said he was tired and asked to be put in bed, Mrs. Canter recalled.

"And this Donald Harvey was standing there, and he said, 'Mrs. Canter, I'll put him to sleep, I'll put him to bed. Don't you worry about it. You can go on home now.'

"That was Wednesday afternoon and Thursday morning the doctor told me he was dead," Mrs. Canter said. "What he gave him I don't know."

Victims

From Page 1A

gastric tube.

■ Claborn L. Kendrick, 65, 798 Clinton Springs, died Sept. 20, 1986, cyanide and water mixture put in gastric tube.

■ Albert Buchlmann, address unknown, died Oct. 29, 1985, cyanide and water put in his gastric tube.

■ Stella Lemon, 87, address unknown, died March 16, 1987, given cyanide three or four weeks before her death. She was transferred to another ward where she died.

Harvey also was charged with the cyanide poisoning death of Powell, 44, of 5120 Grossepointe, March 7, 1987, in an earlier indictment. A mixture of cyanide and water was placed in Powell's feeding tube.

Harvey has been charged

Designer Sale.
Now 1/2 Off* and More.

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

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SUPREME COURT, U.S.

DAVID JOSEPH STEFFEN, :

Petitioner : No. 87-5323

vs. :

THE STATE OF OHIO :

Respondent :

Supreme Court, U.S.
FILED
SEP 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I. CALDWELL V. MISSISSIPPI (1985), 472 U.S. 320, IS NOT APPLICABLE WHERE THE JURY CHARGE GIVEN DURING THE MITIGATION POHASE OF A CAPITAL PROSECUTION IS AN ACCURATE STATEMENT OF LAW, DID NOT ENCOURAGE THE JURY TO RELY ON THE APPELLATE PROCESS, WAS NOT OBJECTED TO AT TRIAL, AND WAS ARGUED TO THE JURY BY DEFENSE COUNSEL.

II. THE USE OF THE SAME UNDERLYING FELONY TO ELEVATE A HOMICIDE TO AGGRAVATED MURDER AND THEN TO ELEVATE THE AGGRAVATED MURDER TO A CAPITAL OFFENSE DOES NOT CAUSE THE OHIO DEATH PENALTY SCHEME TO BECOME UNCONSTITUTIONAL.

III. WHERE AN ISSUE PRESENTED TO THIS COURT FOR REVIEW IS PREMISED UPON A MISSTATEMENT OF THE APPLICABLE STATE LAW, AND WHERE THE STATE LAW AS IT EXISTS WAS PROPERLY APPLIED TO THE CASE, PETITIONER HAS NO BASIS TO SEEK CERTIORARI.

IV. THERE IS NO BASIS FOR REVIEWING A CLAIM THAT A DEATH PENALTY WAS BASED UPON NON-STATUTORY AGGRAVATING CIRCUMSTANCES, AND UPON A REFUSAL TO CONSIDER MITIGATING FACTORS, WHEN THE RECORD PLAINLY DEMONSTRATES THAT THESE CLAIMS ARE INCORRECT.

V. PROPORTIONALITY REVIEW IS NOT REQUIRED IN STATE DEATH PENALTY STATUTES, AND IF A STATE DOES PROVIDE FOR A PROPORTIONALITY REVIEW, IT IS UP TO THE STATE TO DETERMINE THE SCOPE OF SUCH REVIEW.

VI. WHERE THE STATE COURTS HAVE FOUND THAT THE ADMISSION OF A STATEMENT BY THE DECEASED PURSUANT TO AN EXCEPTION TO THE HEARSAY RULE IS HARMLESS ERROR, AND THE STATEMENT AT ISSUE IS EXTREMELY INSIGNIFICANT, THIS COURT WILL NOT GRANT CERTIORARI WHERE THE RECORD FULLY SUPPORTS THE CONCLUSION OF THE STATE COURTS.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DAVID J. STEFFEN	:	
Petitioner	:	No. 87-5323
vs.	:	
THE STATE OF OHIO	:	
Respondent	:	

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO, BRIEF
OF RESPONDENT IN OPPOSITION
TO PETITION

OPINIONS BELOW

The decision of the Supreme Court of Ohio affirming petitioner's conviction and death sentence was released on June 24, 1987, and is reported at 31 O.S.3d 111, 509 N.E.2d 383. [The opinion in the State Appellate Court and the State Trial Court are attached to the brief of Petitioner, and those copies are accurate.]

JURISDICTION

Petitioner's jurisdictional claim is properly stated in his brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See attached Appendix "A".

STATEMENT OF THE CASE

a) Procedural Posture:

Defendant-appellant, David Joseph Steffen, was arrested on August 21, 1982, in connection with a homicide which occurred on August 19, 1982. On September 2, 1982, the Hamilton County Grand Jury returned indictment number B-820404. This instrument charged the defendant with one count of Aggravated Murder, one count of Rape, and one count of Aggravated Burglary. The indictment also contained two death penalty specifications to the first count. Those specifications were that the aggravated murder was committed while the defendant was committing or attempting to commit a rape, and that the offense occurred while the defendant was committing aggravated burglary. Defendant Steffen was arraigned on September 7, 1982, and entered a plea of not guilty. On September 10, 1982, a plea of not guilty by reason of insanity was entered. Defendant was tried to a jury in the Courtroom of Judge Robert Kraft. Trial began on April 25, 1983, and concluded on May 17, 1983. The jury returned verdicts of guilty as charged on all three counts and on both of the specifications to the first count. The sentencing phase of the trial was held on May 20, 1983. At the conclusion of deliberations, the jury recommended that a sentence of death be imposed. On May 25, 1983, the trial court sentenced the defendant to death on the aggravated murder count. Sentences of seven to 25 years were imposed on the Rape and Aggravated Burglary counts. These sentences were made to run consecutively to each other, and to the first count. On December 11, 1985, the First District Court of Appeals affirmed appellant's conviction and sentence. The Ohio Supreme Court affirmed the conviction and sentence on June 24, 1987.

b) Facts:

Defendant-appellant David Steffen was convicted of aggravated murder with two death specifications, Rape and Aggravated Burglary. The victim of the offense was a young girl, Karen Range, age 19. The crime itself was committed in a particularly savage manner, for which the defendant later showed absolutely no remorse. The defendant was a 23 year old drifter, a career

criminal with a continuous and extensive history of contact with law enforcement throughout his entire life. At the time of this offense, the defendant was wanted as a parole violator by the State of Indiana, where he had been serving time for bank robbery and escape. Steffen's family was widely scattered, and he had no relatives in the Cincinnati area. At the time this offense occurred, August 19, 1982, the defendant had been staying with a brother in the Dayton, Ohio area, where the brother was stationed at Wright-Patterson Air Force Base. On August 11, 1982, the defendant had been hired as a door-to-door salesman with a group traveling about the mid-west selling a cleaning product, Hy-Pro Cleaner. On August 19, 1982, the group was in the Cincinnati area, based at the Howard-Johnson motel in Sharonville. The practice of the group was to drop the salesman off in a particular neighborhood, and allow them to go door to door selling. They would be picked up later in the day at a designated time and place. On August 19, 1982, defendant Steffen was dropped off in the Roselawn area of Cincinnati, at about 1:30 p.m., to be picked up at about 3:00 p.m.

At 3:00 p.m., Steffen was on Parkdale Avenue attempting to sell his cleaning product. At 3:00 p.m., he failed in a sale at the Kastner residence at 7342 Parkdale. At 3:15 p.m., he tried to make a sale at 7322 Parkdale, the home of Doris Tolbert, a policewoman with the Cincinnati Police. Ms. Tolbert was on her way to work and could not take time to talk to Steffen. She characterized his approach as aggressive, using the word "pushy" to describe the defendant's technique. Shortly after this, the defendant went to the Range home at 7214 Parkdale. The reason he went there, according to his later statement, was that he saw a young girl in the yard.

That girl was 19 year old Karen Range, the only daughter of Roy and Laura Range. [Both had other children by previous marriages, but Karen was the only child of their marriage.] Karen was living with her parents, but was engaged, and was soon to be married to James Shrider, her fiance. In fact, on the 18th, they had discussed picking up their wedding rings, and Karen's plans for the 19th included dropping a check off at the travel agent's office to pay for their honeymoon cruise. Karen

was alive and well at 3:30 p.m. At that time, her mother called home and spoke to her.

Sometime around 3:30 defendant Steffen gained entrance to the Range household. In his later statement, the defendant claimed that the victim invited him in to demonstrate his cleaning product, however, there is no verification to this story by independent evidence. To the contrary, Mrs. Range testified that there had been no cleaning demonstration done that she could observe. (T.p. 1265) However there is plenty of evidence to demonstrate just what happened after this predator got past the door. Somehow the defendant got Karen into a bathroom where he beat her about the head, choked her, ripped her clothing off, and raped her. The defendant then got a paring knife from the kitchen, returned to the bathroom, and slit Karen's neck open, practically severing her head. (T.p. 1682) The injury was inflicted by at least four separate slashing wounds. This vicious attack caused Karen to die from exsanguination. (T.p. 1685) Karen's death was not an easy one. The medical testimony was that she lived for at least a brief period after one of the first gashes caused a near transection of her trachea. (T.p. 1684) Not content with what he had done, the defendant literally stomped on the dying girl's chest, leaving three footprints on her body, in the pattern on the bottom of his gym shoes. (T.p. 1674) Having completed his bloody task, the defendant then fled the area. Besides his footprints on her chest, he left other calling cards. A bloody fingerprint was left on the sink, and a Hy-Pro cleaner brochure was left behind. He also left behind a towel that he used in his demonstrations. On his way out of the house, the defendant stepped in some dog excrement, leaving another shoeprint. Once out of the house, the defendant abandoned his sales items in some bushes, and threw away his blood-covered shirt. The cleaning materials were recovered later by the police. (T.p. 1347)

The defendant realized that he had missed his pick-up time from his employers, and that he needed an excuse. To this end, at 4:17 p.m. he called the Cincinnati Police and reported his location, and told them that he had been beaten and robbed. Police Officer Robert Lemkuhl responded to the area and inter-

viewed Steffer. He found the defendant be shirtless, with scratches on his chest and neck. (T.p. 1331) Defendant Steffen described a fictional robbery to Lemkuhl, stating that two men in a blue van had attacked him and stolen his shirt, $50.00, and his cleaning material. Police put out a broadcast, and even stopped a blue van in Reading, releasing it after taking the defendant to view it. Steffen was taken to District Four and a robbery report was filled out, although Officer Lemkuhl was skeptical of the validity of the robbery claim. Steffen's employers were called, and they came to District Four and picked him up, returning to Howard Johnson's. (T.p. 1189)

That evening, the Hy-Pro people spoke to Steffen about the days events and about an unrelated problem concerning attempts to cash a check. The upshot of this was that Steffen was fired. He was taken to a bus station and put on a bus to Dayton.

Meanwhile, as all of this was going on, the defendant's brutal handiwork was being discovered. At about 6:15 p.m. Mrs. Range arrived home. Entering through the rear of the house, in the kitchen and family room, she noticed things in disarray. A television and tray table it normally rested on were both on the floor. (T.p. 1264) A cat that should have been there was missing, a table was on the floor (T.p. 1265), and there was dog excrement on the rug. She then went towards the bathroom where she saw blood on the floor and then saw her daughter's body on the floor. (T.p. 1267) The victim's shorts and panties had been ripped and shoved above her waist. Her top was torn open and her bra was ripped off her breasts, which were exposed. Mrs. Range, because of the ripped and moved clothing, thought that her daughter had been raped. Mrs. Range also noticed that her daughter's hair was wet, indicating it had not yet dried and curled after showering (T.p. 1268), which was Karen's normal procedure. Mrs. Range called the police and reported what had occurred. At about this time, her husband arrived home and saw his daughter's massacred body. The police arrived on the scene before 6:30, the homicide squad was called, and an investigation was begun.

The immediate search of the crime scene led to the recovery of the murder weapon, the brochure the defendant left

behind, as well as a fingerprint found on the bathroom sink. Buttons and snaps from the victim's ripped clothing were found all over the bathroom, including a bra snap in the sink, although the victim was on the floor. Her curling iron was still plugged in, in the other bathroom. (T.p. 1386) A toothbrush and rag used by the defendant in his demonstrations were also found in the sink and on the floor, respectively. (T.p. 1456)

The next morning, Officer Lemkuhl, who had heard of the killing, contacted homicide and told them of his contact with defendant Steffen and his belief that the crime report was false. As a result, the police contacted the Hy-Pro people and traced Steffen back to his brother's house in Dayton. At 6:00 p.m., on August 20, 1982, Officers Burke and Gardner, accompanied by a military policeman, arrived at the Wright-Patterson Air Force Base housing occupied by Paul Steffen, the defendant's brother, and the place where the defendant was staying. (T.p. 1480) The officers told Steffen that they were there in reference to his robbery report the previous day. Steffen went with them to the military police office where he was advised of his rights, signed a waiver, and was then questioned.

The initial questioning concerned the robbery report, but the focus soon shifted to the Karen Range homicide. Initially, the defendant admitted being in the area, but denied killing Karen. (T.p. 1483) Later, Steffen told police that he had a step-brother with the same name as he, and that this step-brother had been with him on the demonstrations, and had in fact committed the crime. (T.p. 14868-7) The officers verified that this statement was false by checking with his brother's family. When confronted with his falsehood, the defendant eventually admitted that he, and he alone, had killed Karen Range. (T.p. 1488) The defendant explained his version of how the murder occurred. The defendant indicated that he was in the house doing cleaning demonstrations when he accidentially bumped the victim's breast with his face. He stated that this had provoked uncontrollable screaming by the victim and that he had killed her to silence her. He stated that he could not remember whether or not he had sex with the victim. (T.p. 1492)

The defendant was held in the Greene County Jail until Monday, August 23, 1982, at which time he was returned to Cincinnati. Steffen was taken to a police facility and again advised of his rights, which he waived. He then gave a taped statement, admitting that he killed Karen Range. However, in his taped statement, he denied raping Ms. Range. (T.p. 153, ex #4) stating that:

"I tried to rape her, but I couldn't get an erection."

The defendant was indicted on a charge of aggravated murder with two (2) death penalty specifications. He was also charged with one count of rape and one count of aggravated burglary.

At trial, the State produced evidence as outlined above. Fingerprint expert Clarence Caesar identified the bloody print left in the bathroom as that of defendant Steffen. (T.p. 1445) Hair samples found on the murder weapon and on the victim's blouse were identified as being consistent with the defendant's hair. (T.p. 1566, 1569) The victim's blood type was found in stains on the defendant's jeans and shoelace. (T.p. 1686, et seq.) The analysis of the semen stains in the victim's panties, and of the semen found in her vagina could not exclude the defendant as a source. (T.p. 1623, 1629)

Deputy coroner Carl Parrott, who performed the autopsy, testified as to the injuries inflicted upon Karen Range. Dr. Parrott testified that there were dried blood spots on much of the body including:

> ". . . a single circular discoid unsmeared drop of blood on the pubis. The mons veneris just above the pubis." (T.p. 1674)

This was of great significance. Since the blood was unsmeared, it indicated it got there after intercourse had occurred, otherwise the drop would have been smeared. The coroner also testified that one full and two partial shoeprints could be seen on the victim's chest. (T.p. 1674) Not content to merely rape and kill, the defendant had gratuitously stomped on his victim's body. Semen was found on the victim's panties, as well as in her vagina and externally on her pubic hair. Because of this, Dr. Parrott concluded that intercourse occurred before death. (T.p. 1707)

Dr. Parrot further testified that there was extensive bruising to the face and head, with at least twelve (12) different blows to the head. The victim's nose was broken, and her lips were bruised and torn. The neck, eyes and lungs showed indication that the victim had been choked. There was bleeding around the brain, evidence of subdural and subarachnoid hemmorhage. (T.p. 1677) The coroner also noted bruising on the shoulders, chest and abdomen, and a bruise on the inside of the victim's right thigh. (T.p. 1682) The victim also had numerous defensive wounds on her hands and arms. All of these injuries occurred prior to the final knife attack which killed Karen Range. The defendant apparently beat her into submission, raped her, and then attacked her with a knife. The cause of death was exsanguination caused by knife wounds to the victim's neck. There were at least four separate knife injuries to the neck, leaving a gaping wound measuring five and a half inches by three and a half inches. (T.p. 1682)

The defendant presented a defense of not guilty by reason of insanity. One psychologist was presented in support of this claim. The State presented two psychiatrists and a psychologist in opposition. The jury returned verdicts of guilty as charged on all three counts, and on both death specifications. Trial concluded on May 17, 1983. At that time, the Court set the sentencing hearing for May 20, 1983.

Just prior to the sentencing hearing, the defendant first raised the issue of the constitutionality of the Ohio Death Penalty. Defendant raised five specific issues. One, that felony murder is treated harsher than premeditated murder. Two, the weighing procedure at the sentencing hearing involved too low a burden of proof. Three, the statute fails to provide the jury with guidance at sentencing. Four, defendant argued death was not the least restrictive option available. Five, defendant argued that jury sequestration was improper. The motion was denied.

At the sentencing hearing, the Court reversed the usual procedure. Although the State had the burden of proof, the Court allowed the defendant to open and close the arguments. The Court also indicated that the State could present no new evidence and

was limited to rebuttal type evidence alone. This procedure was followed. At the conclusion of this hearing and deliberations, the jury recommended a sentence of death. On May 25, 1983, the trial court imposed a sentence of death on the Aggravaged Murder count, and sentences of seven to 25 years on each of the other counts. All sentences were made to run consecutively. On December 11, 1985, the First District Court of Appeals affirmed both the conviction and the sentence. On June 24, 1987, the Ohio Supreme Court also affirmed both the conviction and sentence. The present action follows therefrom.

REASONS FOR DENYING THE WRIT

I. CALDWELL V. MISSISSIPPI (1985), 472 U.S. 320, IS NOT APPLICABLE WHERE THE JURY CHARGE GIVEN DURING THE MITIGATION PHASE OF A CAPITAL PROSECUTION IS AN ACCURATE STATEMENT OF LAW, DID NOT ENCOURAGE THE JURY TO RELY ON THE APPELLATE PROCESS, WAS NOT OBJECTED TO AT TRIAL, AND WAS ARGUED TO THE JURY BY DEFENSE COUNSEL.

ISSUES PRESENTED FOR REVIEW AND ARGUMENT

1. AN APPELLATE COURT NEED NOT CONSIDER AN ERROR WHICH A PARTY COMPLAINS OF THE TRIAL COURT'S JUDGMENT COULD HAVE CALLED, BUT DID NOT CALL, TO THE TRIAL COURT'S ATTENTION AT A TIME WHEN SUCH ERROR COULD HAVE BEEN AVOIDED OR CORRECTED BY THE TRIAL COURT.

2. A JURY INSTRUCTION DURING THE PENALTY PHASE OF A CAPITAL CASE INFORMING THE JURY THAT THEIR DEATH PENALTY VERDICT IS ONLY A RECOMMENDATION, WHILE A LIFE SENTENCE VERDICT IS BINDING, DOES NOT OFFEND THE UNITED STATES CONSTITUTION.

3. A DEFENDANT MAY NOT OBJECT TO A JURY INSTRUCTION WHERE HE HAS ARGUED THE IDENTICAL CONCEPT OF LAW TO THE JURY IN HIS ARGUMENT TO THE SENTENCING JURY.

[Argued Together]

ARGUMENT

Petitioner raises here an argument based on this Court's decision in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). The Ohio Supreme Court has extensively and thoughtfully considered the Caldwell issue on several occasions. State v. Rogers, 28 O.S.2d 427, 504 N.E.2d 52 (1987); State v. Buell, 22 O.S.3d 124, 489 N.E.2d 495 (1986) Rogers was specifically remanded by this Court for consideration of the Caldwell issue. [106 S.Ct. 518] While Rogers involved argument, and this case involves a jury charge, the situations are similar enough to create a valid analogy. In Rogers, the Ohio Supreme Court wrote the following two syllabus paragraphs:

> "1. **Caldwell v. Mississippi** (1985), 472 U.S. 320, is inapplicable where the statements made to the jury during the mitigation phase of a capital trial were accurate statements of the law and were not made to induce reliance on the appellate process.
>
> 2. If defense counsel improperly characterizes the role of the jurors during the mitigation phase, then the prosecution may make a brief, corrective statement.

These syllabus paragraphs reflect the Ohio Supreme Court's interpretation of Caldwell, with the caveat that the Court has indicated that it prefer that such argument not be made if possible. State v. Jenkins, 15 O.S.3d 164, at 202, 473 N.E.2d

264 (1984). The Caldwell issue has been raised in several Ohio death penalty cases. With the exception of Rogers, supra, this Court has not granted certiorari in any of these cases.

In the present case, the Caldwell issue is not properly preserved for appeal. The issue was not raised at trial, and was not raised on appeal until the filing of a supplemental brief containing it as petitioner's 28th assignment of error.

The gist of appellant's claim is that the trial court erred in instructing the penalty jury that the jury's verdict recommending a death penalty was just that, a recommendation; while the verdict giving life in prison with parole eligibility after 20 or 30 years was binding. The exact language of this charge was as follows:

> "You must understand, however, that a jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests with this Court after the Court follows certain additional procedures required by the laws of this State. Therefore, even if you recommend the death penalty, the law requires the Court to decide whether the defendant, David Joseph Steffen, will actually be sentenced to death or to life imprisonment. . . .
>
> You must understand that if you make one of these particular recommendations [either life with parole after 30 or 20 years] it will be binding upon the Court and the Court must impose the specific life sentence that you recommend." (T.p. 3017-18)

There was no objection to this charge by defense counsel.

It might also be noted that the above quoted charge is not the only place in the record where this matter was placed before the jury. During voir dire, the parties went through two special venires. Each of these panels were given a similar explanation. (T.p. 30-31, T.p. 873) This also was done without objection of any kind. Further, almost every single prospective juror was advised of this individually during the voir dire. Again, no objection of any kind was raised.

This issue thus first presents itself as an issue of waiver. Ohio holds that objections not raised at trial may not be raised on appeal. State v. Williams, 51 O.S.2d 112, 364 N.E.2d 1364 (1977). State v. Awan, 22 O.S.3d 120 (1986). The first syllabus paragraph from Williams states:

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."

The Ohio waiver rule is of long standing, and is well recognized. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558 (1982). In Engle, this Court recognized and approved the Ohio waiver rule, stating:

> None of the respondents challenged the constitutionality of the self-defense instruction at trial. They, thus, violated Ohio Rule of Criminal Procedure 30, which requires contemporaneous objections to jury instructions. Failure to comply with Rule 30, is adequate under Ohio law to bar appellate consideration of an objection. [citations omitted] The Ohio Supreme Court has enforced this bar against the very due process argument raised here. [citations omitted] We must determine, therefore, whether respondents may litigate, in a federal habeas proceeding a constitutional claim that they forfeited before the state courts." (emphasis added)

The waiver rule was also discussed in the Caldwell cases itself. In Caldwell, there had been an objection at trial, but the issue was not assigned as error on appeal. However, the Mississippi Supreme Court sua sponte raised the issue and discussed its merits. This Court indicated that if the issue had been rejected at the state level on the basis of the failure to raise it, the Supreme Court would not have considered it. [105 S.Ct. at 2638-9] Appellee submits that this issue should be rejected because it was not raised at trial, and further, that this issue should not be treated on the merits.

The charge at issue here was a correct statement of Ohio law. State v. Buell, 22 O.S.3d 124, 489 N.E.2d 795 (1986); State v. Rogers, 28 O.S.3d 427, 504 N.E.2d 52 (1987). State v. Buell involved a charge "substantially similar" to the charge in the present case. The Ohio Supreme Court so determined in deciding this case [31 O.S.3d at 114]. The Ohio court decided in Buell that this charge was a correct statement of law. As that Court stated in Buell:

> "Finally, unlike the comments to the jury in **Caldwell v. State, supra**, the instructions given to the jury in this case are an accurate statement of the law in Ohio. R.C. 2929.03(D)(2) provides:
>
> '* * * If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender

> was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender * * *' (Emphasis added)

This is clearly a question of state law, decided by the highest state court. The issue as to the correctness of the charge as a statement of state law is thus foreclosed. This Court will not interfere in the decision of a State Supreme Court interpreting State law. Petitioner's extensive argument to the contrary is feckless. The charge given here is indisputably a correct statement of Ohio law. Four of the eight justices who participated in Caldwell felt that a correct statement of the applicable state law would not be improper.

The present case is more akin to California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446 (1983). Therein, this Court considered and upheld a California jury instruction that informed the sentencing jury that a sentence of life without parole could be commuted by the Governor. The essence of the holding was that the jury could properly be informed of how the sentencing process works. In the dissent in Caldwell, Justice Rehnquist referred to Ramos as follows:

> "Nor does the Eighth Amendment prohibit any and all communications to a capital sentencing jury concerning the availability of appellate review. In California v. Ramos, we upheld against Eighth Amendment challenge a California statute that required capital sentencing juries to be informed that the sentence of life without possibility of parole was subject to commutation by the Governor. We noted, inter alia, that the instruction was 'merely an accurate statement of a potential sentencing alternative,' 463 US., at 1009, 103 S.Ct., at 3457, and held that informing the jury of the possibility of commutation did not inject too speculative a concern into the jury's deliberations. Although we noted in Ramos that the challenged information bore more than marginal relevance to the jury's sentencing determination, Ramos is not distinguishable from this case on that ground; there is no constitutional requirement that all information received by a sentencing jury be 'relevant.' In any event, the fact that the jury's determination is subject to appellate review, if not common knowledge, is in any event information concerning the judicial process that one would think the jury is entitled to know."

The present case deals with a jury instruction of the type upheld in Ramos, not with closing argument, which Caldwell was concerned with. Justice O'Connor, who cast the crucial vote in Caldwell, specifically stated that she would have affirmed if the remarks had been accurate. In this case, there is no doubt that the instruction was an accurate statement of the law.

In responding to petitioner's claims concerning Caldwell, respondent initially discussed the waiver concept. In closing, respondent would like to point out and emphasize two aspects of this case that give even greater weight to the waiver argument.

In the present case, besides the instruction given by the trial court that the defendant specifically challenges here, the issue was also raised extensively during voir dire. The trial court gave two charges explaining the sentencing procedure, and the jurors were individually questioned as to this. (T.p. 300, 315, 321, 330, 331, 343, 358, 366, 419, 451-2, 466, 489, 521, 548, 665, 669, 717, 720, 743, 777, 8120, 831, 845, 974, 982, 989-90, 996, 1007-8, 1029-30, 1048, 1058, 1067) The emphasis in these questions was on the importance of the jurors role in imposing the death penalty; that the penalty could not be imposed unless they signed the death verdict. Many of the potential jurors were asked if they would have the courage to do this. The whole thrust of this was to point out the heavy responsibility that the jurors have in the sentencing process. This is exactly opposite of the supposed flaw in the Caldwell argument, i.e., that it tended to minimize the role of the jury. Again, this indicates that no Caldwell-type error occurred here.

Finally, this defendant is in even less of a position to complain about this instruction, since he made a similar argument to the jury, to-wit:

> "Now, if David Steffen is, is sentenced and you control the sentencing, you don't have an absolute say on the capital punishment aspect, but as far as the other sentencing it's your purview. The Court has to follow your recommendation as to 20 to life or 30 to life. His life is really in your hands on that." (T.p. 3000)

Thus, defense counsel at trial informed the jury that they did not have the final say on the death penalty but they did have the final say on the other sentencing options. Petitioner can not

now be heard to claim that the trial court erred in communicating the same thing to the jury. Any error would certainly be invited error.

II. THE USE OF THE SAME UNDERLYING FELONY TO ELEVATE A HOMICIDE TO AGGRAVATED MURDER AND THEN TO ELEVATE THE AGGRAVATED MURDER TO A CAPITAL OFFENSE DOES NOT CAUSE THE OHIO DEATH PENALTY SCHEME TO BECOME UNCONSTITUTIONAL.

a) narrowing function:

Defendant relies on Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983), and Barclay v. Florida, 463 U.S. 939, 103 S.Ct 3418 (1984), for the proposition that the function of aggravating circumstances is to narrow the class of homicides which are eligible for the death penalty. The Court's concern in these cases was to provide the jury or trial court with specific aggravating factors that would prevent ". . . arbitrary and capricious sentencing like that found in Furman." Zant v. Stephens, supra, at 103 S.Ct. 2724. The Ohio statute does in fact satisfy this criteria.

O.R.C. 2903.01 defines aggravated murder. Section (A) defines premeditated murder, and section (B) describes felony murder. O.R.C. 2929.04(A) lists eight (8) aggravating circumstances which will elevate an aggravated murder to a capital offense. One of those circumstances, i.e., (A)(7), is that the offense is a certain type of felony murder. Petitioner feels that this dooms the Ohio statute because it does not make premeditated murder a capital offense. In making this argument, petitioner ignores the fact that any of the seven (7) remaining aggravating circumstances could be applicable to a premeditated murder. (A)(7) itself can also be applicable to premeditated murder. Thus, premeditated murder can be a capital offense. Secondly, it is the duty of the legislature to draft statutes, and to determine which homicides will be death eligible. The possibility that certain types of premeditated murder are not capital offenses does not make the statute unconstitutional.

Petitioner feels that the aggravated circumstance found in 2929.04(A)(7), felony murder, is improper because it merely repeats an element of the crime. In other words, the same act that makes the crime an aggravated murder also makes it a capital offense. There is nothing improper in this approach. The legislature has determined that certain felony murders should be punishable by death, where appropriate. In view of the statutory scheme in Ohio, this can only be done through use of an aggra-

vating circumstance. Various federal appellate decisions have already upheld this concept. Wingo v. Blackburn, 783 F.2d 1046 (5th Circ. 1986); Lowenfield v. Phelps, 817 F.2d 285 (5th Circ. 1987); Gray v. Lucas, 677 F.2d 1086 (5th Circ., 1982).

Petitioner's "lack of narrowing" argument is factually incorrect. The felony murder aggravating circumstance does not mirror the felony murder statute, in fact, it does substantially narrow the statute. Felony murder is defined in R.C. 2903.01(B) as follows:

> "(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape."

The aggravating circumstance at issue here, 2929.04(A)(7) is defined as follows:

> "(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." (emphasis added)

The aggravating circumstance does significantly narrow the class of felony murders that are death eligible. Not only must the State show the felony murder, it must also prove one of two possible narrowing circumstance, i.e., that the offender was the principal offender, or, that the murder was committed with prior calculation and design. Also several of the crimes found in the felony murder statute are not present in the aggravating circumstance. Obviously, not all felony murderers will be death eligible. The statute does treat premeditated murder and felony murder equally. Some, but not all, from each class will be death eligible. In fact, all eight (8) Ohio aggravating circumstances could conceivably apply to premeditated murder. Petitioner's claims that all premeditated murders escape the death penalty is simply incorrect.

Defendant's argument that the aggravating circumstances must contain an element independent of the elements of the principal offense has been specifically rejected by the Ohio Supreme Court. State v. Jenkins, 15 O.S.3d 164 (1985); State v. Rogers, 17 O.S.3d 174, (1985). In Jenkins, that Court stated:

> "The system currently in place in Ohio enables this Court to obtain a vast quantity of information with which to effectuate proportionality review, beginning with data pertinent to all capital indictments and concluding with the sentence imposed on the defendant, whether or not a plea is entered, the indictment dismissed or a verdict is imposed by the sentencing authority. See R.C. 2929.021, supra, at fn. 13. Although appellant would have this court require juries returning a life sentence to specify which mitigating factors were found to exist and why they outweigh aggravating circumstances, we conclude that such information is not an indispensable ingredient in assisting us to determine whether the imposition of a death sentence is disproportionate to sentences imposed for similarly proscribed crouses of conduct.
>
> Appellant further asserts that R.C. 2929.03 and 2929.04 are unconstitutional for treating felony murders in a different manner than premeditated murders. According to appellant, a principal in a felony murder is treated more harshly than a defendant charged with a premeditated murder, since a felony murder constitutes one of the eight aggravating circumstances under R.C. 2929.04, while premeditation is not set forth as an aggravating circumstance. Stated otherwise, appellant argues that aggravating factors for felony murders simply duplicate an element of the offense, while a murder by prior calculation and design requires proof of a separate aggravating circumstance in order to justify a death sentence. As such, appellant argues that a single act should not both convict and aggravate.
>
> Assuming, arguendo, that the elements set forth under R.C. 2929.04(A)(7) are identical to those set forth under R.C. 2903.01(B), we need only review the Texas statute at issue in Jurek to determine whether such a practice is constitutionally proscribed.
>
> The Texas statute under consideration in Jurek did not set forth a category of statutory aggravating circumstances which, if proven would justify the imposition of the death penalty. Instead, the Texas system set forth five classes of murders the existence of any one of which would justify the imposition of a death sentence. The high court took notice of the fact that the five classes of murder set forth in the Texas statute encompassed the separate aggravating circumstances set forth in the Georgia and Florida statutes under consideration in Gregg and Proffitt.

> In sustaining the Texas statute, wherein the conduct which convicts also aggravates, the court stated:
>
> '* * * So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option - even potentially - for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime.' Jurek, supra, at 271.
>
> Applying Jurek to the arguments raised by appellant in the present case demonstrates that even if we were to construe the aggravated conduct of felony murder set forth within R.C. 2903.01(B) as functionally equivalent to the aggravating circumstance under R.C. 2929.04(A)(7), no constitutional infirmities would arise. On the contrary, any duplication is the result of the General Assembly having set forth in detail when a murder in the course of a felony rises to the level of a capital offense, thus, in effect, narrowing the class of homicides in Ohio for which the death penalty becomes available as a sentencing option."

The rationale expressed by the Ohio Supreme Court on this issue is entirely consistent with the decision of this Court.

b) treatment of premeditated murder:

Petitioner's second heading under this issue indicates he is concerned about the supposed disparate treatment accorded premeditated murders as opposed to felony murders under the Ohio death penalty system. The argument however, does not exactly correspond to this proposition. Instead the argument appears to be a jeopardy based claim that the defendant is being thrice punished for the same act. Petitioner argues that in a felony murder the same felony is used three times, once as a felony conviction, once to make the homicide an aggravated (felony) murder, and once to make the aggravated murder a death eligible crime. Defendant's argument is incorrect.

So long as the legislature intended cummulative punishment for the underlying felony and the felony murder, multiple convictions are permissible. Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432 (1980); Albernay v. United States, 450 U.S. 333, 101 S.Ct. 1137 (1981); Garrett v. United States, 471 U.S. _____, 105 S.Ct. 2407 (1985). The Ohio Supreme Court has already determined that this is indeed the legislative intention in Ohio.

State v. Bickerstaff, 10 O.S.3d 62, 461 N.E.2d 892 (1984); State v. Moss, 69 O.S.2d 515, 433 N.E.2d 181 (1983). As long as the convictions are obtained in one proceeding, no problem is involved. Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673 (1983). Petitioner's claim that he is punished three times for the same act is spurious. He will be sentenced once for the underlying felony and once for the homicide. He will not get two sentences for the homicide as he states in his brief [petitioner's brief at p. 13]. The fact that alternative sentences are a possibility in no way puts him in jeopardy of more than one punishment.

Peittioner infers, in a classic non-sequitor, that because of this supposed "triple punishment" for a felony murder, that it is possible to obtain the death penalty in a felony murder situation upon less proof than is necessary to obtain a death-penalty in a case charging prior calculation and design plus a specification, and that therefore the statute is unconstitutional. Apparently he believes that in a felony murder situation the state need only prove two points to obtain a death penalty; [since the death spec. is an element of the crime].

1) a purposeful killing;

2) during a certain felony;

while in a prior-calculation crime the state must prove three points:

1) a purposeful killing;

2) with prior calculation and design;

3) a death specification.

Petitioner simply ignores the fact that in all aggravated murders, Ohio requires that the state prove a specific intent to kill. R.C. 2903.01(D). This places a further requirement in the proof of felony murder, and thus evens out the number of required elements of proof. [since prior calculation and design subsumes specific intent.] However, this counting of elements of proof is totally irrelevant. Simply because one crime is more difficult to prove than another does not mean that they cannot have similar or identical penalties. Punishment is to be determined by the

legislature, and unless their judgment is clearly and patently wrong it will not be disturbed. Respondent submits that the petitioner's argument here is without merit.

III. WHERE AN ISSUE PRESENTED TO THIS COURT FOR REVIEW IS PREMISED UPON A MISSTATEMENT OF THE APPLICABLE STATE LAW, AND WHERE THE STATE LAW AS IT EXISTS WAS PROPERLY APPLIED TO THE CASE, PETITIONER HAS NO BASIS TO SEEK CERTIORARI.

Petitioner contends here that the Ohio Supreme Court applied the wrong standard of review when carrying out its statutorily mandated review of the appropriateness of the death penalty. Petitioner contends that Ohio law requires the State Supreme Court to conduct a de novo review and determine that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. In fact it is petitioner who has misconstrued the law. R.C. 2929.05, Appellate Review, establishes the duty of the Ohio Supreme Court to review the appropriateness of the death sentence. That statute provides in pertinent part as follows:

> "(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they reviews the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of comitting outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case." (emphasis added)

This statute requires that the Ohio Supreme Court affirm the death penalty if they determine that the "aggravating circumstances outweigh the mitigating factors in the case." Simply put, contrary to what petitioner says, the Ohio law does not require the Supreme Court to make its finding "beyond a reasonable doubt." Nor is there any requirement that a reviewing court come to such a conclusion 'beyond a reasonable doubt.' See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976).

The Ohio Supreme Court stated its duty under this statute as follows:

> "Our final task today is to undertake the independent weighing process required by R.C. 2929.05(A) to determine whether the aggravating circumstances the offender was found gulity of committing outweigh the mitigating factors in the case." [31 O.S.3d at 126]

The Court concluded that the aggravating circumstances do outweigh the mitigating factors. Petitioner complains that the phraseology the Court used to reach this conclusion demonstrates any number of errors. That language is:

> ". . . we must conclude that the mitigating factors are inadequate to outweigh the aggravating circumstances in this case."

Petitioner contends this language shows the Court applied the wrong standard. This semantic nit-picking is devoid of substance. In reaching this conclusion, the Court had just spent four pages of decision explaining that the mitigating factors were virtually non-existent and that the aggravating circumstances were overwhelming. Respondent would wager that Petitioner is the only one who has any difficulty is understanding what the Court said.

IV. THERE IS NO BASIS FOR REVIEWING A CLAIM THAT A DEATH PENALTY WAS BASED UPON NON-STATUTORY AGGRAVATING CIRCUMSTANCES, AND UPON A REFUSAL TO CONSIDER MITIGATING FACTORS, WHEN THE RECORD PLAINLY DEMONSTRATES THAT THESE CLIAMS ARE INCORRECT.

1.) The Youth of the Petitioner:

Petitioner contends that the trial court failed to give adequate consideration to his age as a mitigating factor. R.C. 2929.04(B) lists the various mitigating factors that are at issue at sentencing. R.C. 2929.04(B)(4) reads:

"(4) The youth of the offender."

As with any factual issue the clear weight of the Ohio authorities is that such issues are to be determined by the trier of fact. State v. Thomas, 70 O.S.2d 79 (1986); State v. DeHass, 10 O.S.2d 230 (1967). In the present case, it was up to the trial court to analyze the evidence and to determine what weight, if any, should be given to age as a mitigating factor. In his required opinion, the trial court carefully reviewed all possible mitigating factors. To the extent that a particular factor was in the record, it was treated by the Court. Factors which were present to a greater degree were given more extensive treatment. Factors which were not present received lesser treatment. With regard to youth of the offender, the Court found that factor to be unpersuasive.

R.C. 2929.03(F) requires the Court to state in its written opinion "the existence of any of the mitigating factors set forth in division (B) of section 2929.04. . ." and explain the reasons why the aggravating circumstances outweigh the mitigating factors. Obviously, if a particular factor is found not present, it will receive a summary treatment. With regard to 2929.04(B)(4), the Court stated in its opinion

> "(4) 'The youth of the offender.' The Court finds that the defendant was born December 22, 1959, and at the time of his trial was twenty-three years of age. There is absolutely no evidence to suggest that he was a youthful offender or that his age was a factor that should be taken into account in mitigation of the sentence of death. This factor was not present.

The trial court thus found that there was no probative evidence that youth should be considered as a mitigating factor. The record supports this conclusion. The defendant was 23 years old,

five years into death penalty eligibility. He was not an innocent naive "youth." He had an extensive criminal record, and was on probation at the time of this offense. He had spent much of his life incarcerated, and was institutionally sophisticated. The offense itself was a heinous, brutal crime, not the act of a youth.

Petitioner apparently believes that the Court must write at length about every factor. That is not what the statute requires. The statute requires an explanation of why aggravating factors outweigh mitigating ones. The trial court examined the youth factor, and noted for the record that he did not find it present. The defendant, while taking the trial court to task for its lack of verbosity here, does not offer any reason, or explanation of why this factor should be given greater weight. Absent a convincing argument in support, this claim is without merit. The Ohio Supreme Court came to the same conclusion. [31 O.S.3d at 117]

2.) demand for retribution

Petitioner contends that the trial court relied upon an improper, non-statutory factor in imposing the death penalty. Petitioner claims that the trial court sentenced in order to satisfy a public demand for retribution. He bases this premise upon the following remark, made by the trial at sentencing:

> "This is what the Legislature had in mind when it passed the new death penalty law. The Legislature was reacting to the demands of the public for retribution and this is an appropriate case to provide such retribution." (T.p. 3050)

No objection was made to this remark at trial. Thus, the matter may not now be raised on appeal. State v. Williams, 51 O.S.2d 112 (1977); State v. Phillips, 27 O.S.2d 294 (1971). Nor is this material found in the trial court's sentencing opinion.

Further, defendant has misinterpreted the trial court's remarks. The Court simply said that the death penalty was reenacted because the public overwhelmingly favored it. The trial court then repeated a truism. Retribution is one of the bases for the death penalty, and it is a proper base. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976) Finally, the trial court indicated that this was an appropriate case for such a

penalty. The court did not say, as defendant incorrectly implies, that the death penalty was given because a mob on the courthouse steps was clamoring for blood. In fact, the court's written opinion, in which the Court is required by law to give his reasons for imposing the death penalty, contains no mention of this at all.

The trial courts of this State are presumed to apply the correct law. State v. Eubanks, 60 O.S.2d 183, 14 O.O.3d 416 (1979). As the Ohio Supreme Court has noted, this rule is not to be lightly treated. State v. Combs, 18 O.S.2d 123 (1985) Taking one or two sentences from a transcript which exceeds three thousand (3000) pages, and using them out of context, or with a strained interpretation, will not justify a reversal. In this case, the language at issue does not even justify the conclusions petitioner derives from them.

3.) future dangerousness

Petitioner next argues that the trial court improperly considered "future dangerousness" as an aggravating factor. During the court proceedings at the time of imposition of sentence, the trial court made the following statement:

> "The defendant has been described as a human time bomb waiting to explode. He did just that in this case and the results were devastating. There is no evidence to suggest that the same type of delayed explosive reaction could not happen again unless action is now taken to prevent it." (T.p. 3049-50)

Petitioner did not object to this statement, although he did have an opportunity to do so. Likewise, the petitioner made no attempt to have the Court clarify what it meant by this remark. He now claims that this remark shows that the trial court considered an improper non-statutory aggravating factor in imposing sentence, i.e., the future dangerousness of the appellant. It is a general rule of appellate practice that an appellate court will not consider a claim of error that was not raised at trial. State v. Williams, 51 O.S.2d 112 (1977). This same rule applies to error that are alleged to be constitutional in nature. State v. Phillips, 27 O.S.2d 294 (1971); State v. Awan, 22 O.S.3d 120 (1986). In Williams, the Court stated:

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called,

> but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."

Since this issue was not raised below, it may not now be raised on appeal. The Ohio First District Court of Appeals, at page 26-27 of its opinion, [see appendix to petitioner's brief] rejected this claim of error for various reasons. One of these reasons was the waiver question. Another was that these oral remarks are nowhere repeated in the trial court's opinion, which is controlling. Further, the remark at issue here is ambiguous. There is nothing in it which suggests that the trial court is predisposed to impose the death penalty improperly. The remark could just as easily refer to other possible sentencing options such as 30 years incarceration without parole. In fact, in the required written opinion, the trial court at no time referred to future dangerousness. The written report must take precedence over the oral remarks made at sentencing. Recently, in State v. Combs, 18 O.S.3d 123 (1985), the Ohio Supreme Court stated:

> "A reviewing court must presume that the trial court applied the law correctly. State v. Eubank (1979), 60 Ohio St.2d 183 [14 O.O.3d 416]. This requirement is violated when the reviewing court isolates two brief extracts from a lengthy transcript and infers therefrom that the trial judge did not understand the law. The first incident relied upon by the court of appeals, i.e., the trial judge's questions concerning whether defendant suffered from a psychosis or neurosis, simply does not by itself indicate a misunderstanding of the Staten test. The second incident, the trial judge's comment in his final ruling from the bench that the defendant did not have a psychosis or neurosis, also fails to establish clear error when viewed in the context of the record as a whole."

In his brief, the petitioner frequently follows the practice condemned in Combs. He takes small parts out of context and attaches to them a significance they were never have been intended to have.

In rejecting this argument, the Ohio Supreme Court stated as follows:

> "As to the trial court's purported reliance on the factors of appellant's future dangerousness and the public's demand for retribution, the remarks to which appellant objects appear only in the court's oral statement in open court before sentencing. No mention of such factors is made in the actual written opinion of the court. Viewing the record as a whole, and mindful

> of the presumption of correctness in the proceedings below, we do not consider these two brief remarks to carry such significance as to taint the entire process of sentence determination in this case. See State v. Coombs (1985), 18 Ohio St.3d 123, 125, 18 OBR 153, 155, 480 N.E.2d 414, 416-17."

This is certainly the correct resolution of this particular complaint.

4.) the aggravated burglary conviction:

Petitioner complains here that the evidence does not support his conviction for Aggravated Burglary and the corresponding death specification. In reality, this is a dispute over the interpretation of state law. The issue that was disputed below was whether or not the "trespass" element of the crime of aggravated burglary could arise after entrance as well as before entrance to a home. This was purely a question of state law, and the Ohio Supreme Court gave an authoritative interpretation of that law. In this Court, petitioner continues to insist that this interpretation is incorrect. Apparently petitioner wants this Court to review the Ohio Supreme Court's interpretation of Ohio law, a practice this Court does not engage in. 28 U.S.C. §1257(3)

5.) nature and circumstances of the offense:

Petitioner's complaint here is that the trial court treated the "nature and circumstances of the offense" as an aggravating circumstance. This claim is simply untrue. In support of his position, the petitioner cited below [in this brief petitioner does not cite to the record to support his claim. He simply states, without explanation or citation, that the trial court did the act now complained of], to the following language in the trial court's opinion:

> "The true circumstances of the offense can be gleaned from the testimony of the state's witnesses who described the scene, the victim's condition, the condition and location of her torn clothes and the presence of semen both in the victim's vagina and in her panties and the presence of spermatazoa. There is ample evidence to indicate the very sordid nature of the offense and its specific consequences. . . . The last moments in the life of Karen Range, in that small bathroom, and in very close proximity to the defendant, it must logically be inferred, were filed with horror and pain." (Op. p. 14, defendant's brief, pg. 36)

This language has been taken out of context, and in any event, it reflects a proper compliance with the applicable statutes. In context, the above statement is taken from a portion of the trial court's opinion which begins:

> "The Court now reviews the remaining possible mitigating factors in O.R.C. 2929.04(B) along with a 'consideration of the nature and circumstances of the offense, the history, character and background of the defendant, which the court will consider as number eight (8). . . ." (Op. p. 12)

In imposing sentence and weighing aggravating and mitigating factors, at least three (3) of the Ohio death penalty statutes require either the jury, the trial court or the appellate courts to consider the facts of the offense in the process.

R.C. 2929.03(A) provides in pertinent part that:

> "(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:. . ." (emphasis added)

This statute is titled, Imposing sentence for a capital offense, and requires the trial court to consider the facts of the crime in reaching a sentencing decision. R.C. 2929.04(B) provides in pertinent part:

> ". . . the court. . . shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history character and background of the offender, and all of the following. . . ."

Again, this statute requires the Court, in imposing sentence, to consider the facts of the crime. R.C. 2929.05, Appellate review of death penalty, provides in section (A) that:

> "(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court

> shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. . . ." (emphasis added)

It is beyond dispute that the laws of Ohio require the courts to consider the facts of the crime and the evidence adduced at trial, in determining the appropriate sentence. The trial court in the present case was doing no more than fulfilling his statutory duty in going over the facts of the crime. In State v. Jenkins, 15 O.S.3d 164 (1984), the Ohio Supreme Court specifically stated that the sentencing authority in Ohio must focus on the particular nature of the crime. Considering the facts as a possible source of mitigation, as required by Ohio law, the court must review them to see if they are such that they do show some mitigating tendency. In effect, what happened here is that the Court examined the facts of the crime, as was his duty. The Court, by his review, determined that such facts contained no mitigating material.

The Court has a duty to set forth his factual findings in his written opinion in order to demonstrate the basis for his conclusions concerning the aggravating and mitigating factors. The aggravating circumstances themselves also bring into play the facts of the crime. One cannot consider the weight to be given the aggravating circumstances without considering the circumstances of which they are comprised. The issue is not only that the aggravating circumstance was committed, but also how it was committed. Finally, the language of the trial court quoted by defendant does not support the defendant's assertion in his brief that the Court considered this material as an aggravating circumstance. The Court stated in its opinion what it considered in reaching its decision. The method used by the Court is stated as follows:

> "The sole issue, which confronted the Court is stated as follows:

> 'DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT, DAVID JOSEPH STEFFEN, WAS FOUND GUILTY OF COMMITTING OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?'
>
> In this regard, all of the statutory mitigating circumstances and all other possible mitigating factors raised by counsel have now been reviewed and discussed. The same has been done with the aggravated circumstances.
>
> Upon full, careful and complete scrutiny of all the mitigating factors set forth in the statute or called to the Court's attention by defense counsel in any manner and after considering fully the aggravating circumstances which exist and have been proven beyond a reasonable doubt, the Court concludes that the aggravating circumstances do outweigh all the mitigating factors advanced by the defendant beyond a reasonable doubt as required by O.R.C. 2929.03(D)(3)." (Op. p. 23-24)

Earlier [at p. 12 of the opinion] the trial court specifically listed the "nature and circumstances" as a mitigating factor. Clearly, the trial court applied the correct test in reaching its sentencing conclusion.

In rejecting this claim, the Ohio Supreme Court stated:

> "Nor do we find error in the trial court's consideration of the nature and circumstances of the offense. R.C. 2929.04(B) provides that the court, in determining whether death is an appropriate penalty, '**shall consider**, and weigh against the aggravating circumstances proved beyond a reasonable doubt, **the nature and circumstances of the offense** * * *' (Emphasis added) Thus, the court is **required** to review this factor. However, appellant appears to contend that the trial court's remarks on this subject reveal that it viewed the nature and circumstances of the offense herein as aggravating rather than mitigating as required by R.C. 2929.04(B). We do not agree. The statute merely requires that the court consider this factor in determining the mitigating factors to be weighed against the proven aggravating circumstances. Obviously, the nature and circumstances of certain offenses will be such that no mitigating feature can be extracted. By its statement on the gruesome and vicious nature of the murder, the trial court herein was merely justifying its conclusion that no mitigating factors can be gleaned from the nature and circumstances of this particular offense. We find nothing improper in the court's remarks."

This approach represents the proper way to treat the 'nature and circumstances of the offense, and is the method commanded by the Ohio statues.

Petitioner concludes his argument by urging that Barclay v. Florida, supra, left open the question of how to deal with cases where non-statutory aggravating circumstances are coupled with strong mitigation, Unfortunately for petitioner, he can satisfy neither of these factual prerequisites. Not only were no improper aggravating circumstances considered, but further, this case is characterized by an almost total absence of mitigation. It is instructive to note that petitioner makes absolutely no attempt to list or develop the presence of mitigation. He merely states in conclusory language that it exists. Even a cursory examination of the record reveals the bankruptcy of petitioner's assertions.

The aggravating factors the petitioner was convicted of were a homicide in the course of a rape, and a homicide in the course of an aggravated burglary. As described earlier, the facts of this particular crime, which make up part of the aggravating circumstances set forth in the specifications, are particularly cruel and brutal. A young girl, about to be married, was raped and literally slaughtered in her own home. She was severely beaten about the head, raped, and then her throat repeatedly slashed such that her head was nearly severed. The defendant savagedly stomped on the victim's chest with enough force to leave identifiable shoeprints on her. The body was left sprawled on a bathroom floor, semi-nude, mutilated and bloody, where her unsuspecting parents came across her. The aggravating circumstances in this case are present to an excess.

In contrast, the mitigating factors are insignificant. The statutory mitigating factors are found in R.C. 2929.04(B), and include the facts of the crime, and the background, character and history of the defendant, along with seven (7) other specific factors. The facts of the crime are set forth earlier in this brief, there is certainly nothing mitigating about them. Likewise, there is nothing endearing about the defendant himself. In fact, he was basically a career criminal who had never done anything positive with his life.

A brief review of the seven remaining circumstances illustrate the correctness of the jury and trial court's decision here.

(1) victim induced or facilitated the offense.

This circumstance is totally absent from this case. The victim did not know the defendant. Their meeting was a chance encounter, in the victim's home. She did nothing which would induce or facilitate the crime.

(2) presence of duress, coercion or provocation.

Once again, this factor was totally absent from the case. Indeed, there was little the victim could have done in this regard. She was physically frail, while the defendant was large, well-conditioned, and a weight lifter. There is no indication anywhere of duress, coercion or provocation.

(3) petitioner had mental defect, which reduced his capacity to understand and control his conduct.

All of the psychiatric witnesses presented by the State indicated that the defendant had what they referred to as a borderline personality disorder. Basically, this meant that he chose not to conform his behavior to the rules of society. None of these witnesses felt that the defendant could not understand or control his conduct. One defense witness, Dr. Noelker, disagreed with this assessment. However, neither the jury nor the trial court found this testimony to be believeable.

(4) the youth of the offender.

The petitioner was 23 years old, five years above the cut-off age for the death penalty. He had been incarcerated often and had an extensive criminal record. He apparently had been emancipated for quite some time, and had spent a period of time drifting around the country. There was nothing about the defendant's age that would mitigate against the death penalty.

(5) lack of significant prior history.

This factor was not present. This petitioner had an extensive criminal history, and was on probation at the time of the present offense.

(6) offender was not principal offender.

Not only was the petitioner the principal offender, he was the only offender. This factor is not present.

(7) any other relevant factor.

The only thing offered here was that the petitioner led a tough childhood and had suffered much abuse. When weighed against the crime that was perpetrated here, the defendant's childhood is of little consequence. Many children suffer abuse, but that does not excuse or mitigate a vicious homicide. The defendant's own siblings went through the same experiences, and none of them felt that it was an excuse to pillage, rape and murder. In fact all information from the siblings indicated petitioner was exaggerating his tale of abuse.

In viewing these mitigating factors, or lack of same, as compared to the aggravated circumstances it is not difficult to see why the jury decided on the death penalty, or why the trial court accepted the jury recommendation. This is not a case where aggravating and mitigating evidence were close in quality. In fact, the jury probably had little difficulty in making its decision, if such a decision can ever be made without difficulty.

V. PROPORTIONALITY REVIEW IS NOT REQUIRED IN STATE DEATH PENALTY STATUTES, AND IF A STATE DOES PROVIDE FOR A PROPORTIONALITY REVIEW, IT IS UP TO THE STATE TO DETERMINE THE SCOPE OF SUCH REVIEW.

Petitioner seeks to have this Court rewrite the Ohio statute dealing with proportionality review. As with an earlier presented issue, this question does not involve matters which this Court would ordinarily review on certiorari.

This Court has already ruled that the various states are not required to conduct proportionality reviews in death penalty cases. Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984). Ohio, however, does provide for proportionality review by statute; R.C. 2929.05(A). That statute contains the following provision:

> "In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."

This provision has been construed by the Ohio Supreme Court to require comparison only with other capital cases. In deciding this case the Ohio Supreme Court wrote the following syllabus:

> "The proportionality review required by R.C. 2929.05(a) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed."

This construction of R.C. 2929.05(A) is in harmony with the statutory language and gives it its obvious meaning. Since proportionality review is not constitutionally required, the states may give their statutory proportionality review any way they desire. This Court indicated in Pulley v. Harris, supra, that the purpose of proportionality, was to serve as one more safeguard in the prevention of arbitrary and capricious sentencing. Just how effective such a scheme is may well be a function of its scope. However, the fact that one system may be broader in its review than another does not cause the narrower one to be constitutionally infirm. Since none is even required, a narrow proportionality review is obviously an improvement, as far as defendants are concerned anyway. It simply adds one more safeguard which is not constitutionally required.

VI. WHERE THE STATE COURTS HAVE FOUND THAT THE ADMISSION OF A STATEMENT BY THE DECEASED PURSUANT TO AN EXCEPTION TO THE HEARSAY RULE IS HARMLESS ERROR, AND THE STATEMENT AT ISSUE IS EXTREMELY INSIGNIFICANT, THIS COURT WILL NOT GRANT CERTIORARI WHERE THE RECORD FULLY SUPPORTS THE CONCLUSION OF THE STATE COURTS.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

A STATEMENT OF THEN EXISTING MENTAL, EMOTIONAL OR PHYSICAL CONDITION IS AN EXCEPTION TO THE HEARSAY RULE UNDER EVID. R. 803(3).

At trial, the victim's mother testified. During the course of her direct examination, the following occurred:

> "Q. Did you have occasion to discuss sexual matters with her?
>
> A. Yes, we did.
>
> Q. What did she tell you?
>
> A. She said she would remain a virgin until --
>
> MR. STUEVE: Objection to that, Your Honor. That's hearsay.
>
> THE COURT: Objection overruled. The answer may stand." (T.p. 1247)

Petitioner contends that the answer was inadmissible hearsay and should have been stricken. Petitioner feels that prejudice accrued to him since it was his position that the semen found in the victim's body came from some earlier sexual encounter, and that the above question and answer improperly negated his defense. [Although the State appellate courts felt it was harmless error to admit this evidence, respondent believes it was properly admitted.]

There are several flaws in the petitioner's position here. First of all, the boyfriend took the stand and denied ever having intercourse with the victim, who was his fiance. (T.p. 1292) Thus, the equivalent testimony was in the record, unobjected to, from another source. His last contact with her was around dinnertime the day before, and was very biref in nature. Secondly, the testimony by the lab people and the coroner was very clear that the semen in the victim's body was recently deposited before her death. (T.p. 1687-88) This ruled out the boyfriend and left only the petitioner as the source. Of course the lab testimony was that the petitioner could not be ruled out as a source. (T.p. 1629) Thirdly, it was apparent that the victim had recently showered before her death. Her hair was wet

and a curling iron was plugged in in the bathroom. Some semen was recovered on her pubic hairs. This was inconsistent with anything but extremely recent intercourse. Thus, no prejudice arose as a result of the testimony of the victim's mother.

As to the legal issue involved, respondent believes that the trial court's ruling was entirely correct. Evid. R. 803, Hearsay Exceptions: Availability of Declarant Immaterial, provides in section 3 as follows:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> (3) Then existing, mental, emotional or physical condition.
>
> A statement of the declarants then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

Under this rule, the decedent's statement as to her then existing physical condition of virginity was properly admissible.

The Court of Appeals and Ohio Supreme Court felt [incorrectly appellee believes] that this testimony was improper, but that its admission was harmless error. In view of the other evidence, referred to above, this conclusion as to harmless error cannot be faulted. Even more appropriate to the harmless error argument is the fact that the death specification at issue, R.C. 2929.04(A)(7), the so-called felony murder spec., is satisfied by proof of rape or of attempted rape. This petitioner conceded in his statement that he intended a rape, but could not get an erection. This alone would be enough to satisfy proof of the rape death specification.

CONCLUSION

Respondent requests this Court to deny the Petition for Writ of Certiorari.

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Appendix "A"

§ 2901.04 Rules of construction.

(A) Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2907.02 Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim without cost to the victim.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

§ 2927.01 Abuse of a corpse.

(A) No person, except as authorized by law, shall treat a human corpse in a way that he knows would outrage reasonable family sensibilities.

(B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.

(C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fourth degree.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

§ 2929.05 [Appellate review of death sentence.]

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

Any court of appeals that reviews a case in which the sentence of death is imposed shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

(C) Whenever sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(2) The offender did not present evidence at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced.

HISTORY: 139 v S 1. Eff 10-19-81.

§ 2929.06 [Resentencing hearing after vacation of death sentence.]

If the sentence of death that is imposed upon any offender is vacated upon appeal because the court of appeals or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

§ 2945.25 Causes of challenging of jurors.

A person called as a juror in a criminal case may be challenged for the following causes:

(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

§ 2941.14 Allegations in homicide indictment.

(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.

(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.

(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form:

Specification (or, Specification 1, or Specification to the First Count, or, Specification 1 to the First Count). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in divisions (A)(1) to (8) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same).

RULE 801. Definitions

The following definitions apply under this article:

(C) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

RULE 802. Hearsay Rule

Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPREME COURT OF THE UNITED STATES

DAVID JOSEPH STEFFEN *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 87-5323. Decided February 29, 1988

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and JUSTICE BLACKMUN joins as to part II, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the petition for a writ of certiorari and vacate the death sentence in this case. But even if I did not hold this view, I would grant this petition in order to address the important unresolved issue of whether an instruction that reduces a jury's sense of responsibility over a death sentence is nonetheless per se constitutional if it is accurate and nonmisleading, even when the instruction serves no legitimate state penological interest.

II

In this case, petitioner was sentenced to death in accordance with the jury's recommendation. The trial court had instructed the jury:

> You must understand, however, the jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the Court follows certain additional procedures required by the the laws of this State. Therefore,

> even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant, David Joseph Steffen, will actually be sentenced to death or to life imprisonment.

The Ohio Supreme Court characterized this as an "instruction to the jury that their recommendation of death would not be binding on the court, and that the final responsibility for the imposition of the death penalty rests with the court." *State* v. *Steffen*, 31 Ohio St. 3d 111, 113 (1987). The Ohio Supreme Court then rejected petitioner's argument that "such an instruction impermissibly reduces the jury's sense of responsibility and increases the likelihood of a recommendation of death," *id.*, at 113, relying upon *State* v. *Buell*, 22 Ohio St. 3d 124 (1986), a prior Ohio Supreme Court case that had rejected the same challenge to a substantially similar instruction. Although *Buell* went out of its way to "emphatically emphasize [that] the better procedure would be to have no comment by the prosecutor or by the trial judge on the question of who bears the ultimate responsibility," the court concluded that the instruction was neither an inaccurate nor misleading statement of Ohio law and held that the instruction was thus constitutional. *Id.*, at 142–144.

I have no cause to second-guess the conclusion that this instruction accurately reflects the state of Ohio law, as authoritatively construed by the Ohio Supreme Court itself. I note, however, that although an Ohio jury's recommendation of death is not binding on a trial court, a trial court cannot impose the death sentence when the jury recommends life imprisonment. Ohio Rev. Code Ann. § 2929.03(D)(2) (1987). Ohio's statutory scheme thus contemplates that juries will bear a crucial responsibility in deciding whether Ohio will impose a death sentence: making their recommendation necessary, if not sufficient, to any sentence of death. The question this case presents is whether an instruction stressing the preliminary nature of a jury's decision can so minimize the jury's sense of responsibility for their decision and so in-

crease the likelihood of a recommendation of death as to be unconstitutional despite the accuracy of the instruction. This question is particularly sharpened here, where the state court evidently concedes that the instruction serves no valid state interest and indeed "emphatically emphasize[s]" that the instruction should not be given.

In *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), this Court laid down a general prohibition against trial comments that minimize a jury's sense of responsibility for a death sentence. We stated, "This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Id.*, at 341. The Eighth Amendment was thus violated, we concluded, when the state attempted "to minimize the jury's sense of responsibility for determining the appropriateness of death," *ibid.*, by suggesting that the sentencing jury was not ultimately responsible because appellate review would be available. Such a suggestion, we reasoned, biased a jury in favor of death sentences in four ways: (1) a jury comprised of laypersons might not understand the limited nature of appellate review; (2) a jury might reach a death verdict, even if it was unconvinced death was the appropriate punishment, in order to "send a message" of extreme disapproval; (3) some jurors might correctly assume that judicial review can reverse a death sentence but not a life sentence and thus might reach a death verdict in order to delegate, and thus avoid, responsibility for making a decision between death and life; and (4) jurors otherwise reluctant to vote for a death sentence might, particularly on a divided jury, view the availability of judicial review as a good argument for giving in to a death sentence verdict. *Id.*, at 330–333.

Of these four sources of bias, only the first is arguably not present in this case because a jury's recommendation of death is subject to plenary judicial review in Ohio. The other three sources of bias cited in *Caldwell* are, however, just as

applicable here as they were in *Caldwell*. This suggests that an accurate and nonmisleading instruction may still raise sufficient fear of jury bias to make it unconstitutional under the *Caldwell* analysis. Indeed, a four-justice plurality of the Court implied that an instruction that minimized a jury's sense of responsibility for a death sentence had to be "*both* accurate and relevant to a legitimate state penological interest" to survive Eighth Amendment scrutiny. *Id.*, at 335–336 (MARSHALL, J., joined by BRENNAN, BLACKMUN and STEVENS, JJ.) (emphasis added). The plurality went on to suggest that an accurate and nonmisleading instruction about appellate review might be invalid because it would serve no valid state penological interest:

> That appellate review is available to a capital defendant sentenced to death is no valid basis for a jury to return such a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence. The argument here urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible. Creating this image in the minds of the capital sentencers is not a valid state goal . . . .

Id., at 336. This analysis is equally applicable to an accurate instruction regarding the non-binding nature of an Ohio jury's recommendation of death. JUSTICE O'CONNOR, however, did not join the part of *Caldwell* articulating this analysis and wrote separately to state her view that an accurate and nonmisleading instruction would present no constitutional difficulties. *Id.*, at 341–43 (O'CONNOR, J., concurring in part and concurring in the judgment). Accordingly, because JUSTICE POWELL did not take part in *Caldwell*, *see id.*, at 341, a majority of this Court has never expressed a view as to the constitutional status of accurate and nonmisleading in-

structions that minimize jury responsibility by emphasizing the preliminary nature of their decision.

I would therefore vote to grant the petition and set the case for oral argument on the issue left unresolved by *Caldwell*.